

2526
No. 11902

United States
Circuit Court of Appeals
for the Ninth Circuit.

FREEMAN STEAMSHIP COMPANY and
FIREMAN'S FUND INSURANCE COM-
PANY,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner, U. S. Employees' Compensation Com-
mission,

Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Southern District of California,

Southern Division

FILED

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PAUL P. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

CITATION ON APPEAL

United States of America—ss.

To Warren H. Pillsbury, Deputy Commissioner,
U. S. Employees' Compensation Commission,
and James M. Carter, United States Attorney,
and Clyde C. Downing, Assistant United States
Attorney, Proctors, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 12th day of May, A. D. 1948, pursuant to an order allowing appeal filed on March 18, 1948, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 706, Southern Division, wherein Freeman Steamship Company and Fireman's Fund Insurance Company are appellants and you are appellee to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Paul J. McCormick United States District Judge for the Southern District of California, this 2nd day of April, A. D. 1948, and of the Independence of the United States, the one hundred and seventy-second.

/s/ PAUL J. McCORMICK,
U. S. District Judge for the
Southern District of California.

Service of a copy of the foregoing Citation, Copy of Petition for Appeal, Order Allowing Appeal and Assignments of Error, are acknowledged this 2nd day of April, 1948.

/s/ JAMES M. CARTER,

United States Attorney.

By /s/ GERTRUDE M. JOHNSON,
Proctors for Appellee.

[Endorsed]: Filed April 5, 1948. [2]

In the District Court of the United States Southern District of California, Southern Division

No. 706

FREEMAN STEAMSHIP COMPANY, a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation,

Libellants.

vs.

WARREN H. PILLSBURY, Deputy Commissioner, 13th Compensation District,

Respondent.

**LIBEL FOR INJUNCTION PURSUANT TO
TITLE 33 USCA, SEC. 921**

To the Honorable District Court of the United States, Southern District of California, Southern Division:

The libellants Freeman Steamship Company, a corporation and Fireman's Fund Insurance Company, a corporation, respectfully show:

Article I.

Libellant Freeman Steamship Company, at all times herein mentioned has been and it now is a corporation. Libellant Fireman's Fund Insurance Company, at all times herein mentioned has been and it now is a corporation.

Article II.

On the 6th day of November, 1944, one Walter Olcott was in the employ of the Freeman Steamship Company, a corporation, as a [3] longshoreman and on said date was working as such longshoreman aboard the steamer "Daisy Gray" on navigable waters of the United States, at San Diego, California.

Article III.

On said date the said Walter Olcott suffered an injury upon the said navigable waters of the United States and the death of said Walter Olcott resulted therefrom.

Article IV.

Within the time allowed a woman claiming to be the surviving wife of said Walter Olcott filed with the United States Employees' Compensation Commission, 13th Compensation District, a claim for a death benefit award. In said claim she alleged that she was married to said Walter Olcott on August 26, 1926.

Article V.

Libellant Fireman's Fund Insurance Company, a corporation, at all times herein mentioned was the longshoremen's and harbor workers' compensation insurance carrier for said Freeman Steamship Company, a corporation.

Article VI.

On February 18th, 1946, the respondent made a Compensation Order awarding a death benefit to the said Cora E. Olcott and a copy of the said Compensation Order is as follows:

“United States Employees’ Compensation Commission, 13th Compensation District, Case No. 1017-42, Claim No. 2177. In the matter of the claim for compensation under the Longshoremen’s and Harbor Workers’ Compensation Act. Cora E. Olcott, Widow of Walter Olcott, deceased, Claimant; against Freeman Steamship Company, Benson Lumber Company, Employers. Fireman’s Fund Insurance Company, Pacific Employers Insurance Co., Insurance Carriers. [4]

“Compensation Order Award of Death Benefit

“Such investigation in respect to the above entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

“Findings of Fact

“That on the 6th day of November, 1944, Walter Olcott, husband of the claimant herein, was in the employ of the employer, Freeman Steamship Company, above named, at San Diego Harbor, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen’s and Harbor Workers’ Compensation Act, and that the liability of the employer for com-

pensation under said Act was insured by Fireman's Fund Insurance Company;

"That on the said day the said employee, while performing service for said employer, Freeman Steamship Company, sustained personal injury occurring in the course of and arising out of his employment and resulting in his death on November 12, 1944, as follows: While lifting heavy timbers on said November 6, 1944, he strained his abdomen, sustaining as a result thereof a small inguinal hernia which became strangulated and was followed by peritonitis and death;

"That defendant, Benson Lumber Company, was not the employer of said employee at the time of his injury and is entitled to be dismissed herefrom with its insurance carrier, Pacific Employers Insurance Company;

"That notice of injury was given within thirty days after the date of such injury, to the Deputy Commissioner and to the employer;

"That medical treatment was not furnished by defendants and that defendants are by stipulation liable for the reasonable cost of such medical, surgical and hospital treatment, the amount thereof to be fixed by further proceedings if the parties are unable to agree thereon; [5]

"That the death of the employee was not due to his unreasonable refusal to submit to medical or surgical treatment;

"That the average earnings of the employee herein at the time of his injury and death exceeded \$37.50 a week;

“That Cora E. Olcott, claimant herein, born February 27, 1879, is the widow of the deceased employee, Walter Olcott, was married to him on August 26, 1926, and was living with him as his wife and dependent upon him for support at the time of his injury. That she is entitled to a death benefit at the rate of \$13.13 a week beginning with November 12, 1944, payable in installments each two weeks or monthly at her election until the further order of the Deputy Commissioner, subject to the limits as to duration of payments, etc, contained in said Act;

“That the reasonable expense of burial of the employee was over \$200. and is owing to Benbough Funeral Parlor, San Diego, California;

“That claimant’s attorney, Ruell H. Liggett, has rendered legal service to claimant in the prosecution of her claim for which a fee is approved in the sum of \$100.00 and lien granted therefor upon compensation benefits herein awarded;

“Upon the foregoing facts, the Deputy Commissioner makes the following:

“Award.

“That the employer, Freeman Steamship Company, and the insurance carrier, Fireman’s Fund Insurance Company, shall pay to the claimant compensation benefits as follows:

“(1) To claimant the sum of \$200.00 on the burial expense, payable direct to said undertaking firm, Benbough Funeral Parlors, San Diego;

“(2) To claimant the sum of \$13.13 a week beginning with November 12, 1944, and payable in installments each two weeks or [6] monthly at her election thereafter until the further order of the Deputy Commissioner, subject however to the payment therefrom of the sum of \$100.00 to her attorney, Ruel H. Liggett, upon his lien for attorney’s fee.

“The claim is rejected as to defendants Benson Lumber Company and Pacific Employers Insurance Company, for the reason that said Benson Lumber Company was not the employer of the said employee at the time of his injury.

“Given under my hand at San Francisco, California, this 18th day of February, 1946.

WARREN H. PILLSBURY,
Deputy Commissioner
Compensation District.”

Article VII.

The only testimony relating to the question whether the said Cora E. Olcott is or is not the surviving wife of Walter Olcott is as follows:

Cora E. Olcott testified as follows:

“Q. You are Mrs. Cora E. Olcott?

“A. Yes, sir.

“Q. You live at 4501 71st Street, La Mesa, California? A. Yes, sir.

“Q. Were you married to Walter Olcott, as stated in your claim, on August 26, 1926, at Tijuana, Mexico? A. Yes, sir.

"Q. Were you continuing to live with him at the time of his last illness? A. Yes.

"Q. There has been no divorce or separation?

"A. No, sir.

"Q. And he was supporting you, was he? [7]

"A. Yes, sir.

"Q. Were there any children as a result of the marriage? A. No.

"Q. Was he helping to support any other person? A. No.

"Q. He supported nobody but you?

"A. That's right.

"Q. Do you have a marriage certificate or a certified copy of a marriage certificate?

"A. No, we don't have it.

"Q. Walter Olcott whom you married at Tijuana, Mexico, is the same Walter Olcott who died on November 12, 1944? A. Yes.

"Q. Whereabouts in Tijuana were you married?

"A. Well, I don't remember very much about it, it has been so long ago, and I never dreamed that I would ever have to keep anything in my mind in regard to it, but it was some place like they had in Yuma, some preacher, as I understand it. I had the papers, but I don't know what I did with them.

"Q. With reference to your marriage, you stated that you were married in Tijuana on August 26th, is that what you said, of 1926?

"A. Yes, that is the only time he was off from his work.

"Q. Can you tell me where in Tijuana you were married? A. I don't know.

"Q. Do you know whether it was an official government building, or was it a church?

"A. It was not in a church.

"Q. Not in a church?

"A. No. I don't remember. It has been so long ago, and we never had thought of the thing before.

"Q. Do you know whether it was a minister or an official of the government that married him and you, or a priest?

"A. It was not a priest. He was something of a—Well, I don't know what he was. He did that all himself, I didn't have anything to do with it.

"Q. You were there?

"A. Yes, I was there when the ceremony was performed.

"Q. Who else was present?

"A. Some Spanish fellow and his wife.

"Q. Did you know this Spanish fellow?

"A. I don't know them. They introduced me to them, but I did not know who they were.

"Q. You were introduced to them at the ceremony? A. Yes, as a witness.

"Q. You had never seen them before?

"A. No.

"Q. Were they friends of Mr. Olcott?

"A. They were acquaintances. I did not ask them if they were his friends. He knew everyone there. I did not know anyone.

"Q. After you were married did you obtain some sort of a paper from the person performing the ceremony?

"A. Yes, got a paper, a certificate like my first marriage, as I understand it.

“Q. Was it in English or in Spanish?

“A. I think it was both, I think it was. Our names were written in English.

“Q. Did you have a marriage certificate?

“A. No, I misplaced it; I don’t know where it is. I don’t keep papers anywhere. I haven’t kept any.

“Q. Have you endeavored to get a copy of it?

“A. Yes. We could not find it.

“Q. Have you gone to Tijuana or sent anyone to Tijuana to get a copy of the marriage certificate?

“A. Yes, I went down to Tijuana to see if I could locate the place, but I could not find it, because I haven’t been there for eighteen years, you see.

“Q. When did you go?

“A. I don’t remember. It has been a month; maybe two or three weeks.

“Q. Did you inquire at the government offices there? A. Yes, that is where I went.

“Q. And they told you they had no record of it?

“A. They could not find it.

“Q. Did they tell you whether or not they had a record of it?

“A. They did not say whether they had ever had any or not, but they could not find that then.

“Q. They could not find a record of it?

“A. That’s right.

“Q. Have you lived with Mr. Olcott continuously since August 26, 1926, as his wife?

“A. Every day, yes.

“Q. You lived publicly together as husband and wife? A. Publicly and honorably.

“Q. During the whole time? A. Yes.

“Q. (By Mr. Roberts): Mrs. Olcott, through your attorney you have filed a suit against the Fireman’s Fund Insurance Company?

“Mr. Pillsbury: You mean the present proceeding?

“Mr. Roberts: Yes. You will stipulate to that, will you not, Mr. Liggett?

“Mr. Liggett: Yes, I will stipulate to that.

“Mr. Pillsbury: Do you refer to the present proceeding, the case here before me?

“Mr. Liggett: I think counsel refers to a civil action in [10] the Superior Court for the purpose of establishing the fact of marriage.

“Q. (By Mr. Roberts): Do you remember, Mrs. Olcott, when Mr. Gallagher took your deposition on February 20th here?

“A. Yes. What do I have to remember?

“Q. Do you remember Mr. Gallagher asking you certain questions? A. Yes.

“Q. In order to be definitely sure of the exact date that your marriage to Mr. Olcott took place, will you again tell me when it was?

“A. It was in August, '26, or August, 1926.

“Mr. Pillsbury: Has there been any decree of the court to establish that?

“Mr. Liggett: No, there has never been any hearing in the matter.

“Q. (By Mr. Roberts): You and Mr. Olcott went to Tijuana by yourselves, did you not?

“A. Yes, sir.

“Q. And there were no friends or acquaintances that were with you? A. None.

“Q. And did you personally file any application for a marriage certificate?

“A. Before I went, you mean?

“Q. At any time?

“A. No. We got the papers down there where we went to get married.

“Q. You did not sign any papers yourself?

“A. No. I guess I must have signed papers. They had papers. [11]

“Mr. Pillsbury: May I ask, Mrs. Olcott, did you find the marriage certificate that was referred to in the last hearing?

“The Witness: No, I haven’t found it.

“Mr. Pillsbury: Go ahead.

“Q. (By Mr. Roberts): What did you personally have to do in getting the papers?

“A. I didn’t do much of anything. We went there some place and was married, and he called in a couple that he knew, and that is all there was to it. He gave him some money and we went.

“Q. You mean he called in two witnesses?

“A. Yes, sir.

“Q. You did not know them yourself?

“A. No. They were friends of his; acquaintances down there. He was very well acquainted down there. I did not know anyone.

“Q. Do you know how long Mr. Olcott had known these witnesses?

“A. No, but he was well known in Tijuana for a long time.

“Q. You did not make the application yourself?

“A. No.

“Q. Were you with Mr. Olcott when he made the license or wrote out the application?

“Mr. Pillsbury: Just a moment. What is the purpose of this inquiry, Mr. Roberts?

“Mr. Roberts: I am laying a foundation for testimony by an expert witness.

“Mr. Pillsbury: Did you find any record at Tijuana?

“Mr. Roberts: No, sir.

“The Witness: Lots of people don’t find their records down there, either. [12]

“Q. Mrs. Olcott, have you made any effort to obtain a certificate of your marriage at Tijuana?

“A. Yes, I looked as far as I could go. I did not know where the place is where we was in. There was a number of places there to get married at that time.

“Q. When did you attempt to get a certificate?

“A. Oh, I don’t know. It has been a month ago, I guess.

“Q. Where did you go at that time?

“A. I don’t even know that, now. We went there some place. I guess the folks there know better than I do about that.

“Q. Was there someone here that went with you at that time? A. Yes.

“Q. Were the witnesses who were present at the time the marriage ceremony was performed Americans? A. No, they were Mexicans.

“Q. And you had never seen either one of them before?

“A. No. I might and I might not have. I did not pay any particular notice to them.

“Q. Do you know who performed the marriage ceremony?

“A. No, I don’t. I supposed at the time it was the Judge. That is what I supposed.

“Q. Did he wear any kind of a uniform, such as a priest, or a preacher might wear?

“A. No; it was not a priest, because I did not have a priest.

“Q. You are sure it was not a priest?

“A. Yes.

“Cross-Examination

“By Mr. Liggett:

“Q. You stated in answer to a question asked you by counsel regarding papers that were signed there at that time, that you did [13] not know what you signed. Do you remember where it was that (you) signed any of the papers?

“A. No. In that little bureau of some kind that they get married in. There were others getting married there, so I guessed it was all right.

“Q. When counsel asked you the question if you made an application yourself, I believe your answer was in the negative. What did you mean when you referred to an application?

“A. That I went to look for it.

“Q. He asked you about at the time of your marriage if you made an application for a license. What did you mean when you said you did not make an application?

“A. I did not myself. He did. He got it himself.

“Q. (By Mr. Pillsbury): What do you understand by the word ‘application’?

“A. I don’t know exactly what you mean by it, unless it was when you get your marriage.

“Q. (By Mr. Liggett): Were you with Mr. Olcott at all times? A. Yes.

“Q. You were with him, right with him?

“A. Yes, I went right with him. But I was married before and I never seen no license.

“Q. Do you know what papers were produced for the signature of yourself and Mr. Olcott on that occasion?

“A. As far as remembering what they looked like, I could not remember what they looked like.

“Q. Were there some papers?

“A. Yes, I had the paper. He gave it to me to take care of, but I never took care of it.

“Q. Is it a fact, then, that you have no fair recollection as to what papers there were or how many there were or who signed [14] them?

“A. No, I don’t.

“Q. After the marriage ceremony had been performed, did either you or Mr. Olcott get a paper of some kind that you were permitted to keep or bring home with you?

“A. Yes, I had a paper.

“Q. How long did you have it?

“A. I don’t know. It has been nineteen years, and it has been hard years; it has been nothing but work.

“Q. I understand that, but I want to know what you did with it. Did you bring it home?

“A. Yes. I brought it home.

“Q. And you kept it for a time?

“A. Yes, sir.

“Q. But you don’t know what became of it?

“A. Yes, I remember of seeing my first one too, my first certificate, but I don’t know what I did with them. I can’t find them.”

John Roberts testified as follows:

“Q. What is your name?

“A. John Roberts.

“Q. What is your address?

“A. 3171 F Street, San Diego 2, California.

“Q. What is your occupation?

“A. I work in a laundry.

“Q. Do you know Mrs. Olcott here?

“A. I do.

“Q. How long have you known her?

“A. Oh, about nineteen or twenty years.

“Q. And did you know Mr. Olcott?

“A. Very well.

“Q. How long did you know him? [15]

“A. Since about nineteen or twenty years, along in there.

“Q. What information have you with reference to the marriage of Mr. and Mrs. Olcott?

“A. Well, we were intimate friends, very intimate. He came to me when he was going to lay off, and he said, ‘Jack, I am going to get married.’ And he said, ‘Don’t say anything, just keep it quiet.’ And he went away and got married, laid off a week, and he came by our house and was going to rent a house, and we lived on 36th Street at the time, in

the 4300 block, and he brought Mrs. Olcott—that was the first time I ever saw her—brought her and took her and my wife, and we went down to see the house he was going to rent on 47th Street, and that was in the 4200 block on 47th, and he told me he was married. We used to say almost anything to each other, because we were so intimate. I said, ‘What did you do? You went down there! Couldn’t you find a priest in San Diego?’

“He said, ‘I didn’t get married by a priest. We got married by a preacher.’

“He took the license out of his pocket, and I can’t tell you much about it. I saw it was a marriage license. That was eighteen years ago.

“Q. Did notice what language it was in?

“A. Yes; it was in Spanish.

“Q. (By Mr. Liggett): Where were you working at that time?

“A. I was working at the Benson.

“Q. Did you and Mr. Olcott both work at the Benson Lumber Company together?

“A. Yes, for years, many years. I worked for Benson Lumber Company in the nineties.

“Q. (By Mr. Grogan): Do you know if Mr. and Mrs. Olcott lived together as husband and wife from that time on? [16]

“A. I do. He introduced himself as her husband, and her as his wife.

“Q. Can you read Spanish?

“A. No, I can’t say I do. I know it when I see it. I can’t read it, but can tell you it is Spanish. I can’t talk it either.

"Q. (By Mr. Roberts): How do you know it was a marriage certificate?

"A. How do I know? How would you know?

"Mr. Pillsbury: Answer the question.

"A. I know by looking at it, of course.

"Q. How?

"A. Well, I don't know just how you want me to define that.

"Q. What did the paper look like to you?

"A. It looked like an official paper. It was a license. There was 'Licencia' there; I saw that. And of course, 'Licencia,' in Spanish, is 'License,' in English. It is pretty near the same as it is in English, very much the same.

"Q. How big was the paper?

"A. Oh, about perhaps the size of that, somewhere near that. A certificate form.

"Q. About half the size of a letterhead, or two-thirds letter size, perhaps?

"A. Something like that.

"Q. Did it have any seal on it?

"A. It did, but I never paid any attention to the seal. He just showed it to me. I wasn't interested in it, and I did not think I would have to say about it twenty years later.

"The Witness: He introduced her to my wife and I as, 'My wife, Mrs. Olcott.' " [17]

Jesus Ruiz, testified as follows:

"Q. What is your name? A. Jesus Ruiz.

"Q. Where do you live, Mr. Ruiz?

"A. Tijuana.

"Q. What is your business or profession?

"A. I am a lawyer.

"Q. Are you admitted to practice in Mexico?

"A. Yes. I have a title which was given to me in May 1910.

"Q. Of what school are you a graduate?

"A. School of Law of the State of Chiapas, and also Free School of Law of Mexico City.

"Q. Have you held any official positions?

"A. Yes.

"Q. What?

"A. In my state after I was admitted to practice, I served as attorney general of justice of the state.

"Q. Of what state? A. Chiapas.

"Q. What courts are you admitted to practice in?

"A. In all the courts of the Republic of Mexico.

"Q. Will you tell the Deputy Commissioner what laws were in effect governing the marriage ceremony in Mexico in 1926, and I refer particularly to those laws which governed marriages at Tijuana, Lower California?

"Mr. Pillsbury: I don't wish to try the question of the validity of the purported marriage. Any proceeding in the nature of annulment of a purported or voidable marriage should be brought in the proper court, and not before me. The question is open in this proceeding as to whether there was any marriage at all, but not the question of whether a purported marriage may or may not have [18] been valid and in compliance with all formalities.

"Mr. Roberts: The Defendant Fireman's Fund Insurance Company and Freeman Steamship Company certainly want to put in the record with reference to whether or not the Mexican laws relating to marriage were complied with, because if those laws were not complied with, it is the contention of the defendant that this widow will not be entitled to compensation benefits.

"Mr. Pillsbury: If it is the contention that it is a voidable marriage, then that matter should go to some proper court for determination.

"Mr. Roberts: It may not only be voidable, but it may be void ab initio, and that is why I want to get this testimony in.

"Mr. Pillsbury: Will you tell a little more fully just what you propose to show by this witness?

"Mr. Roberts: I will try to prove by this witness that the laws in effect in August of 1926, as evidenced by the Civil Code, require that each party fill out and file an application, that they were required to give certain information about themselves, that they were required to be married by a Judge of the Civil Registrar, that it was necessary in order to perform a valid marriage in Tijuana at that time that both parties must have present a witness who had known them for a period of three years, and that at the time the application is made and at the time the marriage ceremony is performed the Judge of the Civil Registrar make a minute entry in the book for recording marriages at Tijuana, and that if those requirements were not complied with, the marriage never was performed.

"Mr. Liggett: I would object to that offer of proof because the main question in the case is as to whether those things did or did not happen, and this witness, as I see it, cannot offer us any testimony on that unless he has made a search of the records. If his testimony is to be theoretical as an expert, I don't see how it can throw any light as to whether the many things which counsel [19] has enumerated here has or has not been done in Tijuana.

"Mr. Roberts: The woman's testimony is very clear about what she did not do, especially with respect to the kind of witnesses.

"Mr. Pillsbury: If it is shown to be a fact that the claimant and Mr. Olcott did go to some Mexican office to a place wherein people were getting married and did go through some form of marriage and that she was given a certificate of marriage, then I would not assume jurisdiction here to determine whether those formalities sufficiently complied with Mexican law. That question is one which should come up, if at all, in proceedings to annul a marriage, and which is matter for the courts. In so far as there may be a contention, if there is one, that she did not go to Tijuana, did not go to any person, that there was no effort to have the marriage made, that question would be open and you could offer evidence on that.

"Q. (By Mr. Roberts): Mr. Ruiz, are there records kept in Tijuana of the marriages performed during the year 1926? A. Yes.

"Q. Where are those records kept?

"A. In the office of the Judge of the Civil Registrar. There are two places where they are kept. One is in Tijuana, and the other is in Mexicali, in case one should be destroyed.

"Q. Have any of the records maintained in Tijuana ever been destroyed since 1925?

"A. No, I have been there all those years myself.

"Q. Did you at anybody's request make an examination of the books kept at the office of the Civil Registrar for the purpose of determining whether or not there was a record of the purported marriage between Walter Olcott, deceased, and Cora Olcott or Cora Hartshorn during the year 1926?

"A. I don't remember the names. On entering the court [20] here I saw this lady here and remembered her as one who had asked me to look up some records for her.

"Mr. Pillsbury: Mrs. Olcott, could you by any chance have used your maiden name at the time of the marriage?

"The Claimant: I took my maiden name.

"Mr. Pillsbury: What is your maiden name?

"The Claimant: Kinzer.

"Mr. Pillsbury: Did you use that name at Tijuana?

"The Claimant: Yes, I did use my own name. I did not use my former husband's name.

"Q. (By Mr. Roberts): Did Mrs. Olcott give you her name and the name of her husband, or what names did she give you?

: "A. She gave me two names, but I don't remember them because they are in English. I personally went to look for them, because I saw she was very much interested and I personally went through the books and I could not find the marriage record.

"Q. Over what period of time or during what years was the search made?

"A. All of the year of 1926, the whole year.

"Q. How did you make your search?

"A. Page by page, entry by entry.

"Q. (By Mr. Pillsbury): What names did you look up? What names did you search for?

"A. I don't remember. It is impossible for me to remember it. The only thing I can remember is having seen the lady here in the room. I also made more of a search. As I could not find it, before I left I suggested to the clerk in the office that he assist her in every way that he could in looking through some of the other years.

"Mr. Roberts: May I be permitted to ask this witness who is [21] legally authorized to perform marriage ceremonies in Tijuana?

"Mr. Pillsbury: Yes, or was at that time.

"A. In that year, since 1917 up until 1932, the laws in effect were the laws of domestic relations, and in accordance with that law there was, as there is now, one official of the Civil Register. He is the Judge of the Civil Register, and that official is the one who performs all marriage ceremonies.

"Q. Mr. Ruiz, what were the requirements of Mexican law with reference to filing of an application for marriage in Tijuana at that time?

"A. May I get the Code?

"Mr. Pillsbury: Just state what it is.

"A. There must be filed a petition to the official of the Civil Registry, a written application, and that application must be signed by the man and by the woman who wish to marry. It must also be signed by the father and mother of both contracting parties in case they are alive, and by two witnesses for both parties, who have known them for three years before the marriage. In that condition it should be expressed the name of the bride and the groom. The names of the father and mother of each one of them should also be stated, where they lived, what was the occupation, their age, and the oath of their being no impediment to the marriage. The question of residence was taken very much into consideration, because only those could marry whose domicile was that of the official registrar. That is all.

"Q. (By Mr. Pillsbury): May I ask, was there only one person in Tijuana in 1926 who could solemnize a marriage?

"A. Yes. There is only one in each population in accordance with the law, and there was only one in Tijuana at that time.

"Q. Could a judge of the civil court perform a marriage ceremony? [22]

"A. No.

"Q. Or the mayor of the town or any other public officer?

"A. No; only in some towns where there is no judge of the civil register and where there is a mayor. In places where there is an official of the civil register, nobody else can perform the ceremony.

“Q. Cannot a priest or minister of the gospel perform a marriage, or could he at that time in Lower California?

“A. No, sir. Since 1884 up to date priests cannot marry any individuals unless they are married first by the civil registrar.

“Q. There was such a thing as a religious marriage, was there not?

“A. No, that is prohibited. It must first be a civil marriage, and priests cannot marry two persons unless they bring a certificate of marriage of the civil registry. If such minister or priest married a couple without such certificate, he would be violating the law.

“Q. There was a judge of the civil registry in Tijuana in 1926, August of 1926?

“A. I am sure there was.

“Q. Are there applications recorded?

“A. Yes, they are recorded, because the procedure is as follows: the petition is filed; the judge calls on each of the persons who have signed an application, one at a time, in order that they may say whether or not that which is written is true. When the applications are presented to the judge, he calls them all in to ratify it. Then after ratifying the application he fixes a time within eight days, and then when they are all present again he asks those who are to be married if they ratify their applications still, and if they still wish to be married, he then declares them to be married in the name of the law and in the name of society, and all that procedure is thereupon recorded in a book.

There is a record [23] made, written in a special book and in that book the married persons sign and the witnesses sign and all those who were present sign. The book is called the Book of Registry of Marriages, and that is kept in such manner.

"Q. When was Mrs. Olcott at the office of the Civil Registry?

"A. About three or four months ago, more or less, as I recollect. I don't remember exactly.

"Q. What conversation did Mrs. Olcott have with you at that time?

"A. She said it was very necessary that she prove she was married to a man who had suffered an accident; that she had lived with him during all of her life, and that it was necessary she have what she would be entitled to in order to live. For that reason I was interested, and I personally went through the books. I felt sorry for the lady, and I personally went to the office of the Civil Registry. After looking through the record there I was convinced that there was no record of her marriage.

"Q. (By Mr. Roberts): In your opinion, if the requirements of law were not complied with, as you have outlined them here, would there have been a legal marriage?

"Mr. Liggett: Objected to as calling for an opinion and conclusion of the witness, and also irrelevant, incompetent and immaterial.

"Mr. Pillsbury: Sustained. I will receive evidence as I said, but on the question of whether or not any attempted or purported marriage was in fact made, but not on the validity of any purported marriage.

“Mr. Roberts: I don’t follow your reasoning. May I have it a little more explicitly?

“Mr. Pillsbury: You may offer any evidence you wish as to [24] whether Mr. and Mrs. Olcott did go to Tijuana or not, to officials there, for the purpose of getting married. And if it should appear that it is apparent that there was some marriage ceremony actually performed and a certificate given the parties, the question of whether that complies in all respects with the Mexican law, or its legal effect, is to be determined in the courts rather than by me. In other words, it would be in the nature of a suit to annul or set aside an invalid marriage, which is a judicial matter.

“Q. (By Mr. Roberts): Do you have any knowledge of your own as to the accuracy and the completeness of the records of marriages in Tijuana during 1926?

“Mr. Liggett: I object to that as calling for an opinion and conclusion of the witness, and no proper foundation laid.

“Mr. Pillsbury: Objection overruled.

“A. The marriages legally held are properly registered or recorded, and in those records is shown the truth of what was done.

“Q. (By Mr. Pillsbury): Are there any other records of marriages there, not of legal marriages, that you had in mind?

“A. No. But when I referred to marriages legally held, I meant that there are many ceremonies which are not legal and proper. But at that time, in 1926, there were not so many of those fake marriages.

"Q. Who are these people who have been performing marriages not legally right?

"A. I don't know exactly. I would like to know them. There are many offices which say, 'Law Office,' all along the whole street. That is where it is done.

"Q. Do they perform marriage ceremonies in those offices you have mentioned? [25]

"A. I know of one instance where I was working in the office of the Judge of First Instance that false marriage certificates and false divorce decrees were presented, some made in Ensenda and some in Tecate, and there wasn't any such marriage or such divorce.

"Q. Tell me, what were the written residence requirements for a valid marriage in Tijuana in 1926?

"A. They have always been, according to the Civil Code, six months of actual residence and doing business.

"Q. By both parties? A. For both.

"Q. Then, an American cannot legally cross the border and be married in Mexico? Is that correct?

"A. No.

"Q. For an American couple to go across the border and get married and come back, that is not a legal marriage?

"A. They do not get married in Tijuana.

"Q. Did they in 1926?

"A. At that time the Governor of the State could waive that requirement of residence, but inasmuch as there had been many abuses of that privilege, since that time it has not been granted.

"Q. Isn't it a fact that many people from the United States have gone across the border and had some form of marriage ceremony performed and came back with a certificate?

"A. They went over there, and the man and woman executed a power of attorney for others to represent them and be married for them in the State of Chihuahua where there is a special law, the law of marriages by proxy.

"Q. How about people, men and women, going to Tijuana and going through some form of ceremony before some officer and being given a marriage certificate and told they are married and come back again, isn't that done to a considerable extent?

"A. What happens is this: I wish to admit the sin of my own town, and it is time that it was corrected. A couple does go to Tijuana to get married. They sign a power of attorney, and that power of attorney is sent to the State of Chihuahua so that they can be married by an attorney-in-fact over there. However, the man in Tijuana who does this work is not an employee of the government nor does he represent the law. I, personally, have not seen this actually done, but it is the common talk, and I have heard evidence to the effect that they go through a ceremony in Tijuana in much the same manner as a valid marriage, 'Do you accept this woman as your husband?' and that they declare them to be married. If they do not declare them married, the couple would not want to pay the \$25.00, or whatever the fee is. But there is no actual marriage performed. The marriage is not per-

formed until the power of attorney reaches the city of town in the State of Chihuahua, when the marriage is performed there by proxy, and the certificate of marriage returned from Chihuahua to the couple.

"Q. The certificate, then, is not given to the parties at the time of the ceremony in Tijuana?

"A. No, not at the time of the ceremony. Afterwards the certificate is sent by mail, and that is the certificate which is legal.

"Q. Has that been done occasionally in past years?

"A. They did not do it in 1926, because, as I stated before, there was no necessity for this, because Americans could come across the line and the Judge of the Civil Registry was permitted to marry them by a special dispensation of the Governor of the State.

"Q. Do all of those marriages necessarily appear in the registry of civil status?

"A. Yes. Which do you mean?

"Q. All of the cases of Americans going across the border in 1926 and becoming married?

"A. Yes, all of them. This is necessary, because in Mexico [27] you cannot prove the status of the persons without registration or a record.

"Q. In a case that I have had before me some years ago that Mr. Roberts is acquainted with, of Mrs. Cowie, the evidence showed that about nineteen hundred—I have forgotten the date—she and Mr. Cowie went across the border at Tijuana, went through some form of marriage that same day and

came back and she presented a paper purporting to be a marriage certificate in Spanish by some officer in Tijuana. I don't know whether that was verified by checking the files, but how would you account for that sort of a situation?

"Mr. Roberts: I would like to object to the question upon the grounds that it is incompetent, irrelevant, immaterial, and the answer would not tend to prove or disprove any issue in this case.

"Mr. Pillsbury: Objection overruled.

"A. The following might be done: Often people come to my office and say, 'We are married, and here is our certificate.' What they present is not a marriage certificate, but a sort of notice given by the official who performed the ceremony, in which it states, 'Mr. So-and-so and Mrs. So-and-so were married on such-and-such a date, and the record of the marriage is in book so-and-so and on page so-and-so.' That is the date which they have so that when they wish a copy of the certificate of marriage they can receive it by paying the cost of \$7.00. There are, however, some instances in which persons who are married in Tijuana are very much interested in getting a copy of the marriage certificate at once, and in that case they pay a special fee to the clerk, who will remain at his desk and not go out to eat and will stay there and make it up for him. That is all. If I had to take my daughter, for instance, to get married and I had urgent need for a copy of the decree of marriage now, I would pay \$25.00 or \$30.00 extra, and they would give me a copy the same day.

"Q. In the case you have just mentioned of the people [28] going to somebody, some official, and receiving such a paper, will there necessarily be a record of that in the register of civil status?

"A. You mean in the case of the man or wife coming in to me and handing me that notice?

"Q. Yes.

"A. The notice is always true, correct, and it serves the purpose of permitting the groom and bride to go to a church and be married religiously.

"Q. Will the registrar of the civil status you mentioned in that case have a record of that marriage?

"A. Yes, it is all there.

"Q. What I am trying to find out is, Is there some way of an American going across the line to Tijuana and going through what they believe to be a marriage ceremony and getting something which looks like a certificate and yet there not being a valid marriage recorded on the register of civil status?

"A. No, that was not the practice in 1926. At that time there were no proxy marriages; they were married legally; there was no necessity for them to commit that crime.

"Q. Is it a practice now?

"A. That is the general topic of conversation in the streets of Tijuana, but personally I have no knowledge of it. If I knew exactly who it was who was doing it, I would already have gotten him into jail.

“Q. If Americans go across the border into Tijuana now and go through a marriage ceremony and come back with a certificate and do not have three months residence in Mexico, or any residence in Mexico, how would you explain that situation?

“A. Possibly they obtained a dispensation of the Governor. It is covered by dispensation, much as when minors are married.

“Q. (By Mr. Liggett): Mr. Ruiz, did you ever search the records over in [29] Mexicali regarding this particular marriage between the Olcotts?

“A. No. I saw the originals, which are in Tijuana. The copies which are in Mexicali, I did not see.

“Q. When you speak of originals, they are both originals, are they not?

“A. Yes, they both are valid.

“Q. It is a fact, is it not, that all of these records are written in longhand and not in typewriting of any kind?

“A. There are some in print. When there are many applications in a day, the applications are filled in on a printed form, but the record is always written by hand. The applications are forms to be filled out, but the record is always in handwriting.

“Q. It is also true, is it not, that many of the marriage records at Tijuana have no index pertaining to them?

“A. Yes, they all have indices, almost all of them. There are some very old books which have no indices, but that is before 1919 when they began there.

"Q. Is it not also true that during the year 1926, or a part of the year 1926 and all of the years 1927 and 1928 that there are no indices at all?

"A. I think they exist. I have an idea that they do. I could not be sure that there were not.

"Q. Isn't it also true that many of the records are written in handwriting that is almost illegible, almost impossible to read?

"A. All are written by hand, but you can read them, well, by paying close attention. Some are indistinct and some are fair, but they can be read.

"Q. Is it also true that approximately seventy-five per cent, that is to say, three-quarters of all the marriages in the book for the year 1926 are between couples or people having American names rather than Mexican or Spanish names?

"A. Yes, there were lots of marriages at that time. [30]

"Q. And nearly all of those people were people who came over to Mexico from the United States?

"A. Yes.

"Q. And they came over there to be married and returned again to the United States immediately after the ceremony?

"A. I don't know whether they returned immediately, but I do know that many of them came over to be married.

"Q. And it is also true that at that time the matter of procuring both divorces and marriages by proxies through powers of attorney were also prevalent there, is it not?

"A. At that time there were no divorces or marriages by proxies. Now there are, yes, in Chihuahua.

"Q. There were then in Chihuahua, weren't there? A. No.

"Q. When did the law in Chihuahua come in effect? A. Which law?

"Q. The one with reference to marriages and divorces?

"A. Divorces about eight years ago, more or less, and marriages about a year and a half or two years ago.

"Q. It is also true, is it not, Mr. Ruiz, that certain marriage records are kept in Mexico City, referring to marriages performed in Lower California?

"A. No, and for this reason: all of the registrations are kept at the capitols of the states or territories. Up to the year 1919 the records for Tijuana were kept in Ensenada. From 1919 up to this date they have been registered in Tijuana and one copy sent to Mexicali. Never have copies been sent to Mexico City.

"Q. (By Mr. Pillsbury): Mexicali is the capitol of the state?

"A. Mexicali is the capitol of the Northern District of the Territory of Lower California, now.

"Q. Let me ask you again, Did you find the record for 1926 [31] well and carefully kept and comparatively complete, or incomplete?

"A. Yes, they are in order and well kept.

"Q. Is there any likelihood, in the case of Americans going across the border to be married in Tijuana in 1926 or later, that the ceremony would be performed and the papers would be filled out and that for any reason they would then not be recorded?

"A. That is, that the marriage was not performed?

"Q. No. The marriage was performed, but the papers not recorded, for any reason?

"A. No, because they have to sign the record. The record of the procedure is written in longhand in a bound book, the pages of which are numbered on both sides, and you cannot extract the leaves from the book, and at the conclusion of the ceremony the book must be signed at the foot of the written procedure.

"Q. Does it require a separate fee to have the papers recorded after the marriage is performed?

"A. They have to pay the fees to the court or to the judge, and a fee to the state.

"Q. And is there another fee for recording after that?

"A. There is no recording fee. It is right in the bound book. The marriage record is right in the book.

"Q. At the time of the solemnizing of the marriage?

"A. Yes. That is, the performing of the ceremony, the solemnizing of the marriage, is all entered in the book and the signing of the book. That is what we call the solemnizing of the marriage.

Without that record being signed there is no marriage.

“Q. I am not speaking of the validity of what they do. Here when the ceremony is performed the papers are signed by the person performing the ceremony and they are then sent over to the county clerk’s office to be recorded. Is there any practice like that in Tijuana for marriages?

“A. No. The judge who marries anyone in Tijuana has his [32] book and writes it in the book.

“Q. At the time?

“A. At the time of performing the marriage.

“Q. (By Mr. Grogan): Mr. Ruiz, at the time of Mrs. Olcott—the lady sitting here at the counsel table—at the time Mrs. Olcott came and met you at the marriage registry three or four months ago, as you have testified, did she tell you her name and the name of her deceased husband?

“A. She told me the name of the two for whom I searched the record. That is necessary, because in the margin of the record the names of the married parties appear.

“Q. (By Mr. Pillsbury): You don’t remember what names she gave you?

“A. No, I don’t. I just recognized the lady as I came in.

“Mr. Grogan: Let the record show that.

“Mr. Liggett: Mrs. Olcott, do you remember the conversation with Mr. Ruiz that he is mentioning?

“The Claimant: Yes, more than has been spoken of.

“Mr. Pillsbury: Anything else of Mr. Ruiz?

"Q. (By Mr. Liggett): When you looked up the index or the document for Mrs. Olcott, how did you have her name spelled in your mind? How did she tell you her name was spelled, and what letter did you look under?

A. She wrote on a small piece of paper the name of the man and her name, and I took the paper. She said, 'Here are the names.' I then went away and looked for the record.

"Q. And were those the only names, the spellings of those names, that you looked under, that she gave you? A. Yes, no more than that.

"Q. She gave you the name of Olcott, didn't she? [33]

"A. I don't remember. It is impossible for me to remember.

"Q. Did you look under any other possible spellings of that name, such as Holcott, spelled with an 'H,' or Wolcott, spelled with a 'W,' or Alcott, spelled with an 'A'?

"Mr. Roberts: I object to the question. He just said he does not know. He took a piece of paper on which the names were written.

"Mr. Pillsbury: Objection overruled.

"A. Yes, I looked under similar names, as well as the names which she gave me, at the office of the civil registrar, and the clerk there joined with me and we looked together.

"Q. Did you look beyond the year 1926, either before or after?

"A. Two years before, and the year 1926, and two years after, five years altogether we looked. I

also asked the lady if she remembered in what building she had been married, and if it was on the lower floor or upstairs. She could not explain to me how she got married.

"Q. Mr. Ruiz, was there any such thing as a common law marriage in Mexico in 1926?

"A. In 1926, no. That was the decision of 1917; prior to 1917 there was such a law. Eight years, it was.

"Mr. Liggett: The only evidence that I have to present at this time would be the testimony of one or two other people who have known the Olcotts for several years past and have known that they lived together and conducted and deported themselves and represented themselves to be husband and wife. If that can be stipulated, that such has been the case, I won't put them on, but if it cannot be stipulated, I will have to put on my witnesses.

"Mr. Pillsbury: Would it be stipulated that such witnesses, if called, would testify to that effect? [34]

"Mr. Roberts: Yes, I think we could stipulate to that."

Cora E. Olcott, testified further as follows:

"Q. (By Mr. Pillsbury): Mrs. Olcott, I believe you indicated a moment ago you recall talking with this gentleman, Mr. Ruiz, who has just testified. A. Yes.

"Q. Did you give him the names to look up in the marriage book and records? A. Yes.

"Q. What names did you give him?

"A. I gave him my maiden name and Mr. Olcott's.

"Q. Is there anything else you want to state about that conversation?

"A. He said he could not understand Mr. Liggett or the lawyers here. He said cases of that kind—

"Q. You are speaking of Mr. Ruiz now?

"A. Yes. Cases of that kind they had to prove that if they lived together for a number of years, that it was settled—

"Q. Anything else?

"A. That was all of importance, that they didn't have to—that they were man and wife."

Article VIII.

In addition to the oral evidence the respondent made investigation in respect to the question whether the said Cora E. Olcott is the surviving wife of Walter Olcott by writing to the Consulate of Mexico, San Francisco, California, on October 3, 1945 and a copy of said letter is as follows: [35]

"Official Correspondence Should Be Addressed to
the Deputy United States Employees' Compensation Commission, Longshoremen's and Harbor Workers' Compensation Act, Thirteenth Compensation District, 417 Market St., Room 318, San Francisco 5, Calif. In reply refer to File No. Walter Olcott, 1017-42.

"October 3, 1945.

"Consulate of Mexico

"San Francisco, California

"Attention: Senor Ballesteros

"Dear Senor Ballesteros:

"I am taking advantage of your offer to make some further inquiry for this office through Mexican government sources with reference to the contention of a valid Mexican marriage at Tijuana. You will recall discussing this matter with me in the presence of Mr. E. R. Kay one of the attorneys for the defendants, recently.

"The general problem is that the right of Mrs. Olcott to a death benefit for the fatal injury sustained by her husband at San Diego on November 6, 1944 depends upon the establishment of her claim that she was married to Mr. Olcott at Tijuana, Mexico, on August 26, 1926. She testified that they were married at a place where several couples were gathered for the purpose of being married and where marriage ceremonies were being preformed. At other times she states she was under the impression that her marriage was performed by a 'preacher.' She says a former marriage certificate, in Spanish, was given them, which has since been lost, and that there were two witnesses to the marriage, Mexican nationals, who were old friends or acquaintances of her husband. There being no evidence impugning her credibility, I am accepting her statement as true as far as it goes. She lived with Mr. Olcott continuously from the day of [36] the

asserted marriage until the date of his death on November 6, 1944, the parties holding themselves out to the community to be husband and wife.

"On the other hand a gentleman named Jesus Ruiz, a lawyer of Tijuana, testified that he has had a check made through the official records of marriage at Tijuana and no record appears of the marriage of these parties.

"Duplicates are kept at Nogales but apparently no search has been made there. If the marriages were validly performed, it would be shown on such records with one exception, that so-called proxy marriages under power of attorney are permitted by Mexican law in which the actual record would be at Chiahuahua or in some other State of the Republic of Mexico. However, he testified that such proxy marriages were not being performed and were not valid in the year 1926 or before approximately two years ago.

"Several questions arise upon which I would appreciate any help that can be obtained from an impartial and authoritative source such as yourself or the Consulate to assist in determining as follows:

(1) Are the records of marriages at Tijuana for a period including the year 1926 carefully, completely and accurately kept.

(2) Upon the information stated above, is it possible or impossible that Mr. and Mrs. Olcott may have been validly married at Tijuana, notwithstanding the absence of an official record as testified to.

(3) If you should happen to be in Tijuana in the near future as you indicate, would you be able to look through the records for that year and see what you can discover.

(4) Is it possible, notwithstanding the absence of such [37] record that Mr. and Mrs. Olcott may have been colorably married at Tijuana, i.e., that they might have appeared before some person who might by argument be supposed to have some authority even though such authority does not now appear with complete validity.

(5) How can one reconcile the so relatively large number of Americans going across the Border to Mexican towns such as Tijuana and returning with purported marriage certificates and believing themselves to be married, on the one hand, with an indicated much smaller number of cases in which records of such marriage are found in the legal register of marriages.

"It seems to be a matter of common knowledge that more American couples go through some form of ceremony across the Border, are given some form of certificate and return in the belief that a marriage has been performed, than Mexican law as to residence requirements, etc. would permit to be married with entries in the register of marriages performed by proper authority.

"Thanking you for any help you can give me in determining the real facts and probabilities of the case, I remain

"Yours very truly,
"WARREN H. PILLSBURY,
"Deputy Commissioner
13th Compensation District.

"P. S. If a search should be made of the records, the information I have is that it was asserted to have been performed on August 26, 1926. Name of the husband was Walter Olcott. Mrs. Olcott states she was married under her maiden name of Cora Kinzer Hartshorn and search might be made under the name of Cora Hartshorn.

WHP.

WHP;s [38]

"CC to Mr. E. R. Kay, Attorney at Law, 233 Sansome Street, San Francisco, California; Mr. Murray H. Roberts, Attorney at Law, Citizens Bank Building, Wilmington, California; Mr. Ruel Liggett, Attorney at Law, 502 U. S. National Bank Building, San Diego 1, California."

Said letter immediately hereinabove set forth was answered by Mario Ballesteros and a copy of said answer is as follows:

"Mario Ballesteros, 'Edificio Lelevier,' Ensenada, Baya California, Mexico.

"November 9, 1945.

"United States Employees' Compensation Commission, Thirteenth Compensation District, 417 Market Street, Room 318, San Francisco, Cali-

fornia. Attention: Mr. Warren H. Pillsbury,
Deputy Commissioner. File: Walter Olcott,
1017-42.

"Gentlemen:

"1. I have thoroughly checked the records of marriages at the Civil Register Office at Tijuana, Lower California, Mexico, and I have found that said marriages for a period of 31 years, including the year 1926, are carefully, completely, and accurately kept, as well as legally maintained.

"2. and 3. When I examined said records as stated above, I found that there was no records of marriage of Mr. and Mrs. Walter Olcott on August 26, 1926, or for any time during the year of 1926.

"3. According to article 46 of the Civil Code then in effect, which is worded as follows: 'The civil status of persons [39] can only be proved by the respective entries in the register. No other document nor method of proof is admissible to prove the civil status, except in the cases provided for by articles 45 and 358.' (Art. 45: 'When no registers have existed, or they have been lost or destroyed, or effaced, or some of the leaves are missing on which it might be supposes (sic) the records was made, proof of the fact or act by means of instruments or witnesses may be received, but if one of the registers has been rendered useless and the duplicate exists, the proof shall be taken from the latter, without admitting any other class of proof (sic).') And art. 358: 'In the cases of abduction or

violation, when the time of the offense coincides with the conception, the tribunals may, at the instance of the interested parties, declare the paternity.); from the information stated above, it is impossible that Mr. and Mrs. Olcott were validly married at Tijuana. The Civil Register Offices have been in existence in Tijuana and instituted since 1914, and in this particular case, the records having not destroyed or effaced, and since none of the leaves are missing on which it might be supposed the record was made, and since therefore, no proof of the fact or act by means of instruments or witnesses may be received; and there being a duplicate book of the register which does not contain any record of such marriage, it is impossible that Mr. and Mrs. Olcott could have been legally or colorably married in Tijuana. They might have appeared before some person, but without any authority to perform marriages.

"5. The number of purported marriages by American citizens in Tijuana is not as large as commonly believed. The purported marriages which are supposed to have been performed in Tijuana, of which records no exists, are, without doubt, done by the parties for their own convenience or for other illegal purposes.

"Also, when I examined said records as stated above, I [40] found that there was no records of marriage under Mrs. Olcott's maiden name of Cora Kinzer Hartshorn on August 26, 1926, or for any time during the year of 1926.

"Wishing that this information will be complete as requested, I remain

"Yours very truly,

"MARIO BALLESTEROS."

Article IX.

There is no other evidence in the record of the proceedings before the respondent with reference to whether or not Cora E. Olcott is the surviving wife of Walter Olcott than as hereinabove set forth.

Article X.

One of the issues submitted to the respondent in his capacity as deputy commissioner was whether or not Cora E. Olcott is the surviving wife of Walter Olcott.

Article XI.

The award is not in accordance with law in that there is no evidence sufficient to support or sustain the findings that Walter Olcott was the husband of Cora E. Olcott or that Cora E. Olcott was married to Walter Olcott on August 26, 1926, or that the said Cora E. Olcott is entitled to a death benefit or that Ruel H. Liggett is entitled to a fee in the sum of One Hundred Dollars or to a lien therefor.

Wherefore libellants pray that the said compensation order be set aside and that enforcement thereof be enjoined.

/s/ LASHER B. GALLAGHER,
Proctor for Libellants. [41]

State of California,
County of Los Angeles—ss.

Lasher B. Gallagher, being first duly sworn, deposes and says: That he is proctor for the libellants Freeman Steamship Company, a corporation, and Fireman's Fund Insurance Company, a corporation herein, and makes this verification on behalf of said libellants for the reason that he is more familiar with the matters set forth in the foregoing Libel for Injunction than the libellants, and for the reason that there are no officers of said corporations residing or now present in the County of Los Angeles where deponent has his office; that the source of deponent's knowledge is review of the typewritten record of proceedings before the deputy commissioner, exhibits admitted in evidence before the deputy commissioner and correspondence; that deponent has read the foregoing Libel for Injunction and knows the contents thereof, and the same is true to the best of deponent's knowledge, information and belief.

/s/ LASHER B. GALLAGHER,

Subscribed and sworn to before me this 4th day of March, 1946.

[Seal] /s/ ENES SARVELLO,
Notary Public in and for said County and State.

[Endorsed]: Filed March 5, 1946. [42]

In the District Court of the United States in and for the Southern District of California, Southern Division.

In Admiralty No. 706

FREEMAN STEAMSHIP COMPANY and et al.,
Libelants,

vs.

WARREN H. PILLSBURY, etc.,

Respondent.

ANSWER OF RESPONDENT DEPUTY COMMISSIONER WARREN H. PILLSBURY

Now comes the respondent, Warren H. Pillsbury, deputy commissioner for the 13th compensation district, United States Employees' Compensation Commission, by his attorney, and for his answer to the libel herein:

- (1) Admits the allegations in Articles I, II, III, IV, V and VI.
- (2) In answer to Article VII of the libel, respondent denies that the only testimony relating to the question whether the said Cora E. Olcott is or is not the surviving wife of Walter Olcott is as stated in said Article VII and respondent refers to the transcripts of [43] testimony taken

at the hearings before him on March 7, 1945 and May 23, 1945, as to the nature and extent of the testimony adduced before him and makes said transcripts a part of this answer, together with copy of the compensation order complained of in the libel.

- (3) Admits the allegations in Article VIII of the libel.
- (4) Denies the allegations in Article IX of the libel, and in this respect respondent avers that on March 18, 1946, pursuant to the regulations duly adopted for the administration of the Longshoremen's Act, he certified the record of the proceedings before him for use by the Court in this proceeding for judicial review and respondent refers to said certificate and the evidence therein described as the complete record in the case, relating to the issue whether Cora E. Olcott was the wife of the deceased employee.
- (5) Admits the allegations in Article X of the libel.
- (6) Denies the allegations in Article XI of the libel.

Further answer the libel, the respondent deputy commissioner avers:

- (a) That as shown by the transcripts of testimony taken before the deputy commissioner and the certified record, made part of this answer, the findings of fact in the compensation order complained of, are supported by evidence and under the law said findings are final and conclusive and not subject to judicial review;

(b) That the compensation order is in all respects in accordance with law.

Wherefore this respondent prays that the libel be dismissed.

CHARLES H. CARR,
United States Attorney.

RONALD WALKER,
Assistant United States Attorney, Chief of Civil
Division.

/s/ CLYDE C. DOWNING,
Assistant United States
Attorney.

Attorneys for Respondent Warren H. Pillsbury,
Deputy Commissioner.

[Affidavit of service by mail attached.]

[Endorsed]: Filed May 7, 1946. [44]

United States Employees' Compensation Commission,
13th Compensation District.

Case No. 1017-42, Claim No. 2177
No. 706 S.D.

In the matter of the claim for compensation under
the Longshoremen's and Harbor Workers'
Compensation Act.

CORA E. OLCOTT, Widow of Walter Olcott,
Deceased,

Claimant,
against

FREEMAN STEAMSHIP COMPANY, BEN-
SON LUMBER COMPANY,

Employers.

FIREMAN'S FUND INSURANCE COMPANY,
PACIFIC EMPLOYERS INSURANCE CO.,
Insurance Carriers.

CERTIFICATION

This is to certify that I am the duly appointed,
qualified and acting Deputy Commissioner of the
United States Employees' Compensation Commis-
sion, for the Thirteenth Compensation District, com-
prising the State of California and other portions
of the United States;

That there has recently been pending before me
as said Deputy Commissioner, a claim for compen-

sation under said Act of Cora E. Olcott, widow against Freeman Steamship Company and Benson Lumber Company, employers, and Fireman's Fund Insurance Company and Pacific Employers Insurance Company, insurance carriers, my file No. 1017-42.

That the attached are true and correct copies of pleadings, transcripts of testimony, exhibits, and decision in said file, as listed below, being a copy of the entire claim file therein as far as relevant to a review of the above proceeding:

1. US-203, Employee's Claim for Compensation (copy)
2. Supplement to Employee's Claim for Compensation (copy)
3. US-262, Claim for Compensation in Death Case by Widow (Copy) [46]
4. US-215, Answer of Employer, SS Freeman and Co., and Insurance Carrier, Firemen's Fund Insurance Company.
5. Transcript of Testimony of March 7, 1945, with Exhibits

Exhibit A—Letter from Waterfront Employers Association of California, Long Beach, dated December 16, 1944.

Exhibit B—Statement of Earnings.

Exhibit C—Statement of Employee's Earnings on printed form of Waterfront Employers Association of California.

Exhibit D—Report of November 15, 1944 from R. O. Peck, MD.

6. Transcript of Testimony of May 23, 1945.
7. Letter of Warren H. Pillsbury, Deputy Commissioner of October 3, 1945, to Consulate of Mexico. (copy)
8. Reply of Mario Ballesteros of November 9, 1945.
9. Letter of Deputy Commissioner transmitting copies of Mario Ballesteros' letter of November 9, 1945. (copy)
10. Letter of Deputy Commissioner to Mario Ballesteros of December 5, 1945 (copy)
11. Letter of Deputy Commissioner to United States Embassy of December 14, 1945 (copy)
12. Letter of Edmundo Gonzalez, Consul of Mexico of December 10, 1945.
13. Letter from United States Embassy of January 17, 1946.
14. Letter from Mario Ballesteros of January 31, 1946.
15. Compensation Order—Award of Death Benefit dated February 18, 1946. (copy)

Given under my hand at San Francisco, California, this 18th day of March, 1946.

/s/ WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

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UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Office of Deputy Commissioner

Administering Longshoremen's and Harbor Workers' Compensation Act

CASE NO.

INSURANCE
CARRIER'S NO.

EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

INJURED PERSON

1. Name of employee Walter Olcott Employee's check No. 697331
 2. Address: Street and No. 4501 71st St. City or town La Mesa, Calif.
 3. Sex Male Age 59 Married, single, widowed Married
 4. Do you speak English? yes Nationality American
 5. State regular occupation Millman
 6. What were you doing when injured? unloading the boat "Daisy Gray".
 7. (a) Wages or average earnings per day, \$.80 (Include overtime, board, rent, and other allowances.)
 (b) Per week, \$ (c) Were you employed elsewhere during week in which you were injured? (d) If so, state where and when
 8. Were you paid full wages for day of accident? Yes.

EMPLOYER

9. Employer Benson Lumber Co. and Waterfront Employers Assn.
 10. Office address: Street and No. 1895 Main St. City or town San Diego, Calif.
 11. Nature of business Lumber

THE INJURY

12. Place where injury occurred On boat or pier, at Benson Lumber Co.'s Wharf
 (Give place and name of vessel)
 13. Name of foreman Hansom Harvey
 14. Date of accident or first illness, the 6th day of November, 1944, at 2:00 o'clock P.M.
 15. How did accident happen or how was occupational disease caused? Employee, Olcott, was unloading lumber from the boat "Daisy Gray" at the request of his employer, Benson Lumber Co. He picked up an end of a heavy plank and ruptured himself in the intestines.
 16. State fully nature of injury or occupational disease: Ruptured intestines or burst bowel.

NATURE AND EXTENT OF INJURY

17. On what date did you stop work because of injury? November 6, 1944, 194.....
 18. Have you returned to work? (Yes or No) No. If "yes," on what date? 194.....
 19. Does injury keep you from work? (Yes or No) Yes, employee now deceased
 20. Have you done any work in period of disability? no

21. Have you received any wages since injury? yes. If so, from and to what date?
 For portion of day of injury, amounting to \$ 5.83

22. Has injury resulted in amputation? No. If so, describe same Resulted in death

23. Did you request your employer to provide medical attendance? yes. Has he done so? yes
 24. Attending physician: Name Dr. Richard J. Peck Address Medico-Dental Bldg.
 25. Hospital: Name Mercy Hospital Address San Diego, Calif.

26. Have you given your employer notice of injury? (Yes or No) Yes. When? Nov. 6, 1944, 194.....
 27. If such notice was given, to whom? Foreman
 28. Was it given orally or in writing? Oral.

NOTICE

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by CORA OLcott

Claimant

Mail address 4501 71st St., LaMesa, California

16-41040-2

Dated January 13, 1944
filed Jan. 13, 1945 P.R.

SUPPLEMENT TO EMPLOYEE'S CLAIM FOR COMPENSATION

The employee, Walter Olcott, was a regular employee of Benson Lumber Company. His foreman at Benson Lumber Company was Ransome Harvey. However, on the day of his injury he was instructed by Benson Lumber Company to go to the Benson Wharf to unload lumber from the steamship "Daisy Gray" owned by the Freeman Steamship Company of San Francisco, Capt. Bachman, Skipper. Olcott went to the pier and started the unloading. The unloading was under the general supervision of Waterfront Employers Assn. The check which he received for the portion of a day's pay on the day that he was hurt, in the sum of \$5.83, was signed by the Waterfront Employers Assn.

From the foregoing facts it will be seen that it is a little difficult for claimant to state definitely by whom he was employed at the exact moment of injury, although his regular employment then was and for many years last past has been with the Benson Lumber Company, and the aforesaid unloading of lumber operations were being performed on behalf of Benson Lumber Company. It is not known to the employee (nor to his undersigned widow) just what reciprocal or mutual arrangement there was, at the time of this injury, between Benson Lumber Company, the Steamship Company and the Waterfront Employers Association.

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UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Office of Deputy Commissioner Warren H. Pillsbury, Dist.13

Administering Longshoremen's and Harbor Workers' Compensation Act

CASE No. 1017-42

82

INSURANCE
CARRIER'S NO.

CLAIM FOR COMPENSATION IN DEATH CASE BY WIDOW AND/OR CHILDREN UNDER THE AGE OF EIGHTEEN

1 I hereby make claim for compensation arising out of the death of Walter Ulcott
 2 who died on November 12, 1944
 3 at Mercy Hospital, San Diego, California, as a result of injury sustained on
 4 November 6, 1944, at Benson Lumber Co.'s wharf, on Pier or
 5 Boat "Daisy Gray" (place where injury happened and name of vessel)
 6 in the employ of Freeman Steamship Co., Steamer "Daisy Gray" & Owners
 7 whose address is 705 Fife Bldg., San Francisco (Name of employer) San Francisco (City or town) San Francisco (County)

Deceased left the following children who were under 18 years of age at the time of his death:

Name

Date of birth

none

These questions should be answered where the widow is claiming compensation

8 Widow was born on February 27, 1879 at Pike County, Ohio
 9 Widow was married to the deceased on (Date) Twenty-sixth (Place) day of Aug., 1926
 10 at Tijuana, Mexico by a Judge of the First Instance.
(Place where married) (Name or title of person performing ceremony)

11 Last physician or hospital Mercy Hospital, San Diego, Calif. (Dr. Richard O.
Peck, Medico-Dental Bldg., San Diego, Calif.)

12 Name of undertaker Benbough Funeral Parlor (Name and address) Address San Diego, Calif.

13 Amount of undertaker's bill, \$ 211.00 Amount paid, if any, \$ none

14 By whom paid — (Name)

(Address)

Dated this 29th

Mrs. Cora E. Ulcott

day of January, 19 45Address 4501 71st St., La Mesa, Calif.

AFFIDAVIT

STATE OF California, COUNTY OF San Diego, 88:

On this 29th day of January, A.D. 1945, personally appeared before me the above-named Mrs. Cora E. Ulcott and made oath that the answers by claimant above named and subscribed are true.

Severly Axier

Notary Public

Address 502 U.S. Nat'l Bk. Bldg.

16-29342-1

San Diego, Calif.

[SEAL]

Filed Feb. 15, 1945 P.h.

U. S. GOVERNMENT PRINTING OFFICE

58

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UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Office of Deputy Commissioner WARREN H. PILLSBURY
 Administering Longshoremen's and Harbor Workers' Compensation Act

Case No. 1017-42

INSURANCE
CARRIER'S NO.ANSWER OF EMPLOYER OR INSURANCE CARRIER TO EMPLOYEE'S CLAIM FOR
COMPENSATION

Cora Olcott, Wife of _____, Claimant
 Walter Olcott, Deceased,

SS Freeman & Company, Employer
 Firemans Fund Ins. Co., Insurance Carrier

The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is { denied } that applicant sustained an injury on or about the date set forth in the application.
2. It is { denied } that both the employer and employee were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury.
3. It is { admitted } that the relationship of employer and employee existed at the time of the injury.
4. It is { admitted } that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.
5. It is { admitted } that notice of injury was given employer as specified in application.
6. It is { admitted } that applicant was permanently disabled to the extent stated in application.
7. It is { admitted } that applicant was temporarily disabled for the period stated in application.
8. It is { admitted } that the rate of wages as set forth in application is correct.
9. _____

Signed MURRAY H. ROBERTS

Note.—The employer or insurance carrier should answer the claim within ten days from the date that a copy of it is served upon him. The original answer should be mailed to the deputy commissioner at the above address and a copy thereof served upon the claimant either personally or by mailing to the address in the claim.

United States Employees' Compensation Commission, before Hon. Warren H. Pillsbury, Deputy Commissioner, 13th Compensation District

Case No. 1017-42, Claim No. 2178

CORA E. OLCOTT, widow of Walter Olcott,
Deceased,

Claimant,

against

FREEMAN STEAMSHIP CO., BENSON LUMBER COMPANY,

Employer.

FIREMAN'S FUND INSURANCE COMPANY,
PACIFIC EMPLOYERS INSURANCE CO.,

Carriers.

REPORTER'S TRANSCRIPT

Proceedings at San Diego, California,
March 7, 1945

Pursuant to Notice this matter was heard before Hon. Warren H. Pillsbury, Deputy Commissioner, United States Compensation Commission, in the Grand Jury Room, Court House of the County of San Diego, in San Diego, California, on Wednesday, March 7th, 1945, at 11:00 o'clock a.m.

Appearances were: Claimant in person and by her attorney, R. H. Liggett, Esq.; Murray H. Roberts, Esq., for defendant Freeman Steamship Company and Firemen's Fund Insurance Com-

pany; S. J. Grogan, Esq., for Pacific Employers Insurance Company and Benson Lumber Company; [53] J. G. Thomas, Esq., for Benson Lumber Company.

Mr. Pillsbury: Hearing on the claim for death benefit on account of the nature of the issues raised by the respondents, it is proven that hearing will be necessary. It is understood that the chief issue is whether the deceased employee Walter Olcott was in the employ of S. S. Freeman & Company, owners of the steamer "Daisy Gray" insured in the Firemen's Fund Insurance Company, or was in the employ of Benson Lumber Company, insured in Pacific Employers Insurance Company, at the time of the alleged injury.

Defendants Benson Lumber Company and Pacific Employers Insurance Company are represented by Mr. G. C. Thomas, attorney at law, appearing for Benson Lumber Company, and Mr. S. J. Grogan, attorney at law, appearing for Benson Lumber Company and Pacific Employers Insurance Company.

Defendants S. S. Freeman & Company, and Firemen's Fund Insurance Company not represented. An answer has been filed by them, constituting an appearance. I understood from their attorney, Mr. Murray H. Roberts, yesterday that he would be here, but assume that he has been delayed on the road. Because of shortage of time I am taking up the case after waiting fifteen minutes beyond the time set, [54] taking up matters first which presumably will not be involved in substantial controversy.

It is also possible that the situation known as general and special employer may also be an issue as to the identity of the employer.

Is there any question as to jurisdiction?

Mr. Grogan: No, we are not raising that issue; that is, the Benson Lumber Company or Pacific Employers.

Mr. Pillsbury: And you admit an injury in the course of the work that has caused the death?

Mr. Grogan: We have no definite information about that.

Mr. Pillsbury: You are placing that in issue, are you?

Mr. Grogan: No, we are not.

Mr. Pillsbury: You admit that it is—

Mr. Grogan: But it is our information that he did have an injury.

Mr. Pillsbury: Then you are willing to stipulate to it or that the burden will be on the plaintiff to establish it, if any?

Mr. Grogan: I think she should establish it.

Mr. Pillsbury: It will be in issue, then.

The following facts are agreed to between claimant and defendants Benson Lumber Company and Pacific Employers Insurance Company: [55]

First, that Walter Olcott, the deceased, was performing services of a maritime nature, to wit, stevedoring, on and about November 6, 1941, at San Diego, California, in connection with the steamship *Daisy Gray*, and at that time Benson Lumber Company was insured against liability under the Longshoremen's &

Harbor Workers' Compensation Act as extended by the United States in the defendant Pacific Employers Insurance Company.

Second, The claim is within the provisions of said Act and the jurisdiction of the Deputy Commissioner.

Third, No claim is made of intoxication or of wilfully self-inflicted injury.

Fourth, Notice of claim of injury within thirty days admitted.

Fifth, that the average earnings of the employe at said time were over the maximum prescribed by said Longshoremen's & Harbor Workers' Compensation Act.

Sixth, that no compensation has been paid.

Seventh, that temporary disability amounted to six days in all.

Eighth, that if award be made against these defendants it may include the reasonable medical, surgical, medicine and hospital expense incurred by and on behalf of claimant.

The issues as to these defendants are:

First: Whether Walter Olcott was in the employ of Benson Lumber Company at the time of the alleged injury; [56]

Second: Whether he was injured as claimed;

Third: Whether his injury occurred in the course of and arose out of the employment;

It is stipulated further that if said injury is established it may be taken to be the cause of the death.

Mr. Grogan: I wish to raise the issue of dependency.

Mr. Pillsbury: What is your contention there?

Mr. Grogan: I wish to put her on proof of the fact that she was dependent and also married to the deceased.

Mr. Pillsbury: At this point Mr. Murray H. Roberts, attorney for defendants Freeman Steamship Company and Firemen's Fund Insurance Company, enters the proceedings. Mr. Roberts, what issues are you raising on behalf of your clients?

Mr. Roberts: Employment, injury arising out of and in the course of the employment, dependency, unreasonable refusal to submit to the proper medical attention.

Mr. Pillsbury: Otherwise you are joining in the same stipulations?

Mr. Roberts: I wish to add another one, too: Average earnings.

Mr. Pillsbury: An Additional Issue will be noted as to the Benson Lumber Company as to the fact of relationship and dependency of the claimant.

With reference to defendants Freeman Steamship Company and Firemen's Fund Insurance Company, the following facts [57] are agreed to by the parties:

First, that Walter Olcott was engaged in maritime service, that is, stevedoring, on or about the steamship *Daisy Gray* on November 16, 1944, at San Diego, and at said time said Freeman Steamship Company was insured against liability under the Longshoremen's & Harbor Workers' Compensation Act by insurance in defendant Firemen's Fund Insurance Company.

Second, that the claim is within the provisions of said Act and the jurisdiction of this Commissioner.

Third, that no claim is made of intoxication or wilfully self-inflicted injury.

Fourth, if award be made in favor of claimant, it may include the reasonable medical, surgical and hospital expense.

Fifth, Notice of claim of injury within the proper time admitted.

Sixth, that no compensation has been paid.

Seventh, that temporary disability extended for six days only.

The issues raised by these defendants are:

First: Whether the said Walter Olcott was in the employ of defendant Freeman Steamship Company at the time of the alleged injury.

Second: Whether he was injured as claimed.

Third: Whether such injury occurred in the course of [58] and arose out of the employment.

It is stipulated that if said injury is established it may be taken as the cause of death.

Fourth: Average earnings of the deceased.

Fifth: Whether claim is barred by unreasonable refusal of the deceased to submit to medical attention.

Sixth: Relationship and dependency of claimant.

Any other issues, Mr. Roberts?

Mr. Roberts: No, sir.

Mr. Pillsbury: I will take Mrs. Olcott's testimony first.

MRS. CORA E. OLCOTT

having been first duly sworn by the Deputy Commissioner, testified as follows, to wit:

Direct Examination

By Mr. Pillsbury:

Q. You are Mrs. Cora E. Olcott?

A. Yes, sir.

Q. You live at 4501 71st Street, La Mesa, California? A. Yes, sir.

Q. Were you married to Walter Olcott, as stated in your claim, on August 26, 1926, at Tijuana, Mexico? A. Yes, sir.

Q. Were you continuing to live with him at the time of his last illness? [59] A. Yes.

Q. There has been no divorce or separation?

A. No, sir.

Q. And he was supporting you, was he?

A. Yes, sir.

Q. Were there any children as a result of the marriage? A. No.

Q. Was he helping to support any other person?

A. No.

Q. He supported nobody but you?

A. That's right.

Mr. Pillsbury: Mr. Liggett, any questions as to relationship and dependency?

Mr. Liggett: I believe not.

Mr. Pillsbury: Mr. Grogan, any questions?

(Testimony of Mrs. Cora E. Olcott.)

Cross-Examination

By Mr. Grogan:

Q. Do you have a marriage certificate or a certified copy of a marriage certificate?

A. No, we don't have it.

Q. May I ask your age, Mrs. Olcott?

A. 65.

Redirect Examination

By Mr. Pillsbury:

Q. Walter Olcott whom you married at Tijuana, Mexico, is the same Walter Olcott who died on November 12, 1944? [60] A. Yes.

Mr. Pillsbury: Mr. Roberts, any questions?

Cross-Examination

By Mr. Roberts:

Q. Were you ever married before, Mrs. Olcott?

A. Yes.

Q. To whom? A. Eugene Hartshorn.

Q. Where did you marry Mr. Hartshorn?

A. Hot Springs, South Dakota.

Q. How was that marriage dissolved?

A. Well, I got a divorce.

Q. Where did you get the divorce?

A. Oklahoma City.

Q. Do you have a copy of the decree of divorce?

A. No, I don't have any. I just can't keep papers. I lose everything.

Q. Did you have any other marriages, Mrs. Olcott? A. No.

(Testimony of Mrs. Cora E. Olcott.)

Redirect Examination

By Mr. Pillsbury:

Q. Were you divorced from this man before you married Mr. Olcott?

A. Oh, yes, thirteen years before. [61]

Recross-Examination

By Mr. Roberts:

Q. There wasn't any marriage in between Mr. Hartshorn's divorce and Mr. Olcott's marriage to you? A. No, sir.

Q. Was Mr. Olcott, as far as you know, ever married before?

A. No, he was never married.

Q. Whereabouts in Tijuana were you married?

A. Well, I don't remember very much about it, it has been so long ago, and I never dreamed that I would ever have to keep anything in my mind in regard to it, but it was some place like they had in Yuma, some preacher, as I understand it. I had the papers, but I don't know what I did with them.

Mr. Pillsbury: If you are going to this at length we will postpone the further examination until we dispose of other witnesses. She can be recalled. We will dispense with the claimant's testimony for the moment and hear witnesses present on other issues. Mr. Liggett will lead off to establish the fact of injury, if you have witnesses present.

(Testimony of Mrs. Cora E. Olcott.)

Mr. Liggett: No. I subpoenaed Mr. Newman over here, and I presume he knows something about it.

Mr. Pillsbury: Meanwhile, expenses of burial, etc., have been over \$200.00 and has been unpaid. Will that be stipulated to? (Discussion.) It is stipulated that upon Mr. Liggett's statement as to the funeral expenses [62] were over \$200.00 and are unpaid, and that this is due to the Benbough Funeral Parlors, San Diego, California.

CARL O. NEWMAN

having been first duly sworn by the Deputy Commissioner, testified as follows, to wit:

Direct Examination

By Mr. Pillsbury:

Q. What is your name?

A. Carl O. Newman.

Q. How do you spell it?

A. (Spelling it out) N-e-w-m-a-n.

Q. Your address, Mr. Newman?

A. 2140 Granger Avenue, National City.

Q. What is your occupation?

A. At the present time I am working as a mechanic's helper.

Q. Did you know the late Walter Olcott?

A. Yes, I have known him from—by working there at Benson's for the last four years.

Q. Were you working with him or near him about November 6th of last year?

A. Yes, were discharging cargo off the Daisy Gray.

(Testimony of Carl O. Newman.)

Q. And that is the date asserted in the claim as the date of the supposed injury. Do you know anything [63] about his receiving any injury?

A. Walter and myself were working, building sling loads of lumber to be taken out of the hold to be discharged on the wharf.

Q. Were you on the ship at the time?

A. Yes. And the lumber was in pieces of 4x8's all the way from 14 to 32 feet long. It was wet and heavy. I handled one end of the stick and Walter handled the other, and that one particular piece—it was in the afternoon, and we had built several sling loads but I don't remember just how many, and we put a long stick about 32 feet long on the load to complete the work we were doing when he complained about severe pain in his stomach and put his hand over it and leaned against the load we were building and rested for a while. In fact, he sat down on the load.

Q. Did he say anything?

A. He just complained that he had a pain in his stomach.

Q. What did he say?

A. He said: "My stomach hurts," and put his arm over it, and he sat down, and I waited for him to get up, and by that time we had to place a short piece of the lumber about 14 or 16 feet long on the same sling load to finish it, and we lifted that up without any pryer, and we done the same thing, and that was all there was to it. He didn't lift up any more lumber after that, and I helped him out of the [64] hold on the ladder.

(Testimony of Carl O. Newman.)

Q. You didn't do any more work after he complained of a pain?

A. No, not on the ship, that I know of.

Q. What was he doing again just before he said that his stomach hurt him?

A. The first time or the second time when he said it?

Q. Were there two times?

A. He made the same remark on the long stick of lumber and again on the shorter stick.

Q. What was he doing with reference to the long stick of lumber just before or at the time when he said that his stomach hurt?

A. I looked at my head on the load and got it somewhere near the balance, and it wasn't up to him to lift up his end of the stick, but to help me slide it in place, and he had to twist to the left. He was standing right against the bulkhead of the ship, and in order to bring that stick over he had to twist to the left side. He had to place it in position.

Q. How heavy a lift would you say it was for each of you?

A. It is pretty hard to say where you get a balance on the stick, but I would say it would be around, perhaps, a hundred or two hundred pounds; something like that. [65]

Q. Was it about a normal lift or was it an unusually heavy lift?

A. I don't think two men could carry a stick like that.

(Testimony of Carl O. Newman.)

Q. Would you say whether it was heavier than ordinary work?

A. Yes, because the lumber was wet.

Q. How far had he gone on lifting his end when he complained?

A. It wasn't up to him to lift that end at all. It was his part to slide that stick end because I had the pressure on the other end over the balance, on the sling load.

Q. Did he finish what he was doing with that piece? A. Yes.

Q. How soon after that did he complain?

A. Right after the stick was in place.

Q. Was anyone helping him on his end?

A. No.

Q. What more do you know about his condition after that? A. That is all I do know.

Q. Did he do anything on the short piece after that long piece?

A. Yes, he helped me lift that up and put it on the load. [66]

Q. And did he say anything then?

A. Yes, he made the same remark about the pain in his stomach, and put his hand over his stomach.

Q. Did you notice anything about his appearance at that time?

A. No, I could not tell anything about that.

Q. Did you see him again after that?

A. Yes, it was the next day when the mate on the ship wrote out a statement for him to go to the doctor. I had to sign that.

(Testimony of Carl O. Newman.)

Q. Did Olcott come down to the ship the next day? A. No. He was on the pier.

Q. Did you see him on the pier? A. Yes.

Q. What happened as far as you know?

A. I just asked Walter how he felt and said: "Not so good." He just made the remark that he was going to the doctor. I went back to work.

Q. Did you hear any conversation with the mate as to what he was doing?

A. No, the mate didn't say anything.

Q. How do you know there was anything said about a slip to be taken to the doctor?

A. The mate was writing a report out on the paper before I signed it.

Q. You signed the report, did you [67]

A. That was not as much a report as it was an order for Walter Olcott to go to a doctor.

Q. Did you sign your name on the slip to the doctor?

A. I signed it on that report that the mate made out, yes.

Q. Was that a slip to the doctor that you signed or a report of the injury?

A. I think it was both, a report plus an order to the doctor.

Q. Did you have any more conversation with Mr. Olcott at that time? A. No.

Q. Did you see him again? A. No.

Mr. Pillsbury: Mr. Ligget, any questions?

Mr. Liggett: I believe that covers it, sir.

(Testimony of Carl O. Newman.)

Cross-Examination

By Mr. Grogan:

Q. That slip you signed, did you read it before you signed it?

A. No, the mate explained to me that it was a report of the accident to the doctor for him to have medical treatment, and I signed it.

Q. Did he say anything to you about signing as a witness because you had witnessed the accident?

A. No, he said I was supposed to sign it as a witness [68] to the—that it had been an accident where it happened.

Q. That is, that you had witnessed the accident?

A. Yes.

Q. You weren't signing an order for the man to go to the doctor, as far as you know?

A. That I could not say, whether it was a direct order to go to the doctor or whether it was an order plus a statement of the accident.

Mr. Grogan: All right, I have no further questions.

Mr. Pillsbury: Mr. Roberts?

Cross-Examination

By Mr. Roberts:

Q. Mr. Newman, did Mr. Olcott vomit?

A. Not that I know of.

Q. Did he complain of being sick at his stomach?

A. He complained of severe pain in his stomach.

Mr. Roberts: That is all.

Mr. Pillsbury: That is all. You are excused. Thank you. Next witness!

Mr. Liggett: I think I have nothing else. Of course, Mrs. Olcott can testify as to his actions around the house.

CORA E. OLCOTT

having been previously sworn, on being recalled to the witness stand, testified as follows, to wit:

Redirect Examination of Mrs. Olcott
By Mr. Pillsbury:

Q. Mrs. Olcott, did you have any conversation with your husband on November 6th about anything that might have happened to him?

A. Certainly. I helped him undress himself and put him to bed.

Q. What time was that?

A. It was in the middle of the afternoon some time. I didn't notice what time it was.

Q. Did you know how he came home?

A. Yes, he came home in the car.

Q. Did he drive the car himself?

A. Yes, he drove it himself.

Q. What did he say to you when he came in?

A. He said he lifted too hard and something snapped in his bowels.

Q. What more did he tell you at any time after that about the nature or origin of his condition?

A. He suffered very much and vomited all the time. He could not even keep water on his stomach.

Q. Did he tell you anything more about what had happened to him?

(Testimony of Mrs. Cora E. Olcott.)

A. No, only he lifted to heavy and that he should not have gone; he knew that he should not have gone there to work. [70]

Q. What doctor was there in attendance?

A. The company's doctor. It was Doctor Peck.

Q. Was he moved to a hospital?

A. No, Peck had him running up there every day practically, and they held him up there every day around the office, and he done nothing.

Q. How was he gotten into the Mercy Hospital?

A. Peck wouldn't come out there and he could not come up there any more. I wouldn't let him go up there any more because he was too sick afterwards, so Peck sent an ambulance after him Friday evening.

Mr. Pillsbury: According to my calendar November 6th was a Monday.

Witness: Yes.

Q. It was the following Friday, November 10th, that he was taken to the hospital?

A. Yes.

Q. And then he died on November 12th?

A. Yes.

Q. Were any other doctors in attendance, do you know?

A. No, not that I know of. There was a doctor that operated, Dr. Lawrence.

Mr. Pillsbury: Mr. Liggett, any questions?

Mr. Liggett: No. No questions.

Mr. Pillsbury: Mr. Grogan? [71]

Mr. Grogan: I have no questions.

Mr. Pillsbury: Mr. Roberts?

(Testimony of Mrs. Cora E. Olcott.)

Cross-Examination of Mrs. Cora E. Olcott

By Mr. Roberts:

Q. Mrs. Olcott, did you have an opportunity to observe Mr. Olcott's physical condition at the time you helped undress him?

A. What do you mean by "physical"?

Q. Did you see any marks or bruises or scars or anything like that?

A. Not on the outside, no.

Q. Was it a complaint of pain in the stomach, or anything more?

A. It was in the bowels right across the bowels, and then it all worked down to one side.

Q. And lodged in the groin, you mean?

A. Yes. I thought he had prostrate or appendicitis, because it was in that direction of the appendix, and the pain all worked down to that point.

Mr. Pillsbury: That will be all for the present. Have you any other evidence establishing the injury, Mr. Liggett?

Mr. Liggett: No.

Mr. Pillsbury: Then I will take the employment question next. Perhaps Mr. Newman has something on that. [72] He was working with him. Mr. Newman, will you take the stand again?

CARL O. NEWMAN

having been previously sworn, on being recalled to the stand, testified as follows, to wit:

Direct Examination

By Mr. Pillsbury:

Q. Mr. Newman, do you have any information as to who you were working for at the occasion on the steamship *Daisy Gray* on which Mr. Olcott complained of pain in the stomach?

A. Well, the only thing that I know about that is that we were not working for the Benson Lumber Company, and the money we drew was sent down from Santa Monica.

Q. Who asked you to go to work on the *Daisy Gray*?

A. Mr. West asked me if I would help out?

Q. Who? A. Mr. West.

Q. Who is he?

A. That is my foreman at Benson's.

Q. Did you have any conversation with anybody at the time you went to work as to who you were working for? A. No.

Q. All you know, then, is that your foreman sent you there? [73]

A. No, he didn't send me there. He asked me to help out on it; if I would help out on it.

Q. Where had you been working up to that time?

A. Out in the garage.

Q. You hadn't been working for the Benson Lumber Company? A. Yes.

(Testimony of Carl O. Newman.)

Q. What was your employment with the Benson Lumber Company?

A. I say I was—I am working in that garage, helping on truck repairs.

Q. Who was Mr. West employed by at that time?

A. Mr. West is superintendent for Benson Lumber Company.

Q. Have you any other information as to who hired the gang on which you were working, or of which you were a member in the work on this boat?

A. I don't know that part of it.

Mr. Pillsbury: Any questions, Mr. Liggett?

Q. (By Mr. Liggett): I would like to ask a question or two on that point. After you had received the suggestion, or direction, whichever it was, from Mr. West to report to the pier, did you find the boat Daisy Gray there when you arrived at [74] the pier? A. Yes, sir.

Q. Whom did you report to when you got there?

A. To the mate.

Q. Do you know his name?

A. I don't know what his last name is, but we called him Charlie.

Q. Did he direct you where to go and what to do, this man Charlie? A. Yes.

Q. How long had you worked there on or prior to the date of November 6th?

A. I think it was twice.

Q. You mean you worked there all day on the 6th?

A. Wait a minute. I didn't get that right. What was the question again?

(Testimony of Carl O. Newman.)

Q. You mean you worked there all day on the 6th?

A. I started to work when the Daisy Gray came in. I think it was the 3rd.

Q. Then is it true that you had worked there two or three or four days up to the date of this accident that you speak of where Mr. Olcott complained of injury? A. Yes, sir.

Q. And during all of that time did you take your general directions, and so forth, from the man whom you called Charlie? [75]

A. Whenever necessary that we did have to have information about the cargo, or what to unload next, he was the man to give us the information.

Q. Did you report back each evening to the Benson Lumber Company when you finished work at the boat or at the pier?

A. No, that was not necessary.

Q. And did you report to the Benson Lumber Company each morning before you went to work on the boat or the pier? A. No.

Q. You went direct from your home to the boat and back again? A. That's right.

Mr. Liggett: I believe that is all.

Cross-Examination

By Mr. Grogan:

Q. Mr. Newman, while you were working on the Daisy Gray, did you receive any instructions or directions from the Benson Lumber Company?

A. No.

(Testimony of Carl O. Newman.)

Q. You took all of your orders and instructions and directions from this man, the mate of the ship?

A. That's right.

Q. And, I believe, you referred to him as "Charlie"? [76] A. Yes, sir.

Q. (By Mr. Pillsbury): Did you receive any pay from the Benson Lumber Company for the time you worked on the Daisy Gray? A. No.

Q. (By Mr. Grogan): Were you paid by the Waterfront Employers Association? A. Yes.

Q. You said the check came from Santa Monica. Did you mean San Pedro, or do you know where it came from?

A. Well, it came from up north. I went over to the waterfront hiring hall and picked them up and then carried them over and handed them to Mr. West, and he gave them to the rest of the fellows that worked on the boat.

Q. At any rate, you did not get any check or money from the Benson Lumber Company for the time you worked on the Daisy Gray, is that right?

A. That's right.

Q. You started working there on the 3rd of November, on the Daisy Gray? A. Yes.

Q. When did you finish?

A. After the boat was unloaded. It was about Tuesday or Wednesday.

Q. That would be the 7th or 8th of November?

A. That's right. [77]

(Testimony of Carl O. Newman.)

Q. You worked steadily, did you, the 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th of November?

A. Yes.

Q. You devoted your entire time to working on the ship? A. That's right.

Q. Did you know that the ship was coming in on the 3rd of November?

A. No, I did not know it until I seen it come in, and then I was asked if I would help out to unload the cargo.

Q. Was your rate of pay the same while working for the Benson Lumber Company and while working or unloading the cargo on the ship?

A. No, the pay on the ship in my case was more.

Q. How much more?

A. Straight time for seven and one-half hours, and overtime after six hours was \$1.65.

Q. How much was straight time?

A. \$1.10 on the Daisy Gray.

Q. \$1.10 per hour? A. Yes.

Mr. Pillsbury: Gentlemen, I am aware from other cases that \$1.10 and \$1.65 per hour are stevedoring boat rates. [78]

Q. (By Mr. Grogan): Mr. Newman, you were working as a stevedore, were you not?

A. Yes, sir.

Q. And Mr. Olcott was also working as a stevedore, was he not with you? A. That's right.

Mr. Grogan: I believe that is all.

(Testimony of Carl O. Newman.)

Cross-Examination

By Mr. Roberts:

Q. Would this name sound familiar to you as being the man's name: Norman J. Huegenette?

A. I never heard the name before. I would not know.

Mr. Pillsbury: Do you have any other witnesses, Mr. Liggett?

Mr. Liggett: No, I haven't.

Mr. Pillsbury: Mr. Grogan or Mr. Roberts, do you desire to call a witness to this hearing?

Mr. Roberts: I have no witnesses.

Mr. Pillsbury: Mr. Grogan? Is Mr. West here?

Mr. Grogan: In the present state of the record, I don't believe there is any evidence against Benson Lumber Company, and I don't feel that there is any evidence for the defendant Benson Lumber Company to offer at this time.

Mr. Roberts: The only evidence before the Commission at this time [79] is that Mr. Newman was employed on the Daisy Gray.

Mr. Pillsbury: I will assume for the purpose of the evidence that Mr. Olcott was working on the same gang and under the same circumstances. Mr. Grogan, what further evidence have you to offer?

Mr. Grogan: Mr. West, take the stand, please.

CALVIN C. WEST

being first duly sworn, testified as follows:

Direct Examination

By Mr. Pillsbury:

Q. State your name. A. Calvin C. West.

Q. Your occupation?

A. Yard superintendent, Benson Lumber Company.

Q. Your address?

A. 3794 Pershing Avenue, San Diego, California.

Mr. Pillsbury: At this time Mr. Liggett offers a letter from the Waterfront Employers Association of California, Long Beach, dated December 16, 1944, making reference to an enclosed check——

Mr. Roberts: Is that to be offered in evidence?

Mr. Liggett: I will offer it in evidence.

Mr. Roberts: I object on the grounds that it is hearsay, and on the further grounds that it is incompetent, [80] irrelevant, immaterial, and does not tend to prove or disprove any issues in this case.

Mr. Pillsbury: Objection overruled. Received in evidence as Exhibit A. It will not be incorporated in the evidence, but will be accepted as an exhibit from Mr. Liggett.

Q. Were you familiar, Mr. West, with the arrangements or circumstances under which some lumber was being unloaded on the steamship Daisy Gray between about November 3rd and November 6th, or afterwards? A. I was.

(Testimony of Calvin C. West.)

Q. State what you know about those circumstances and what was the arrangement.

A. The customary arrangement had been, for the past three months previous to this date, on account of the man-power shortage and the boat being unable to obtain longshoremen, for the Benson employees to get permission from their business representative of the Lumbermen's Union to work aboard the boat to help discharge it.

Q. And this boat, the *Daisy Gray*—is my understanding correct—that that was unloading lumber for the Benson Lumber Company?

A. Consigned to the Benson Lumber Company, some of it, and some to other people in town.

Q. And there has been a Longshoremen's hiring hall in San Diego for many years? [81]

A. Yes, sir.

Q. Had any arrangements been made with them as to getting longshoremen to unload the *Daisy Gray*? A. Yes, sir.

Q. What?

A. When the boat sails from the north it is customary for them to send us a wire about what time they leave. From that wire we can estimate just about what time it is due here. It has been customary for us to contact the longshoremen's hiring hall to find out the availability of manpower at the time the boat is due here. If they are unable to furnish us with a sufficient crew to unload the boat, it has been our practice to allow any of our employees that wanted to work aboard the boat to do so.

(Testimony of Calvin C. West.)

Q. In this case did you clear with the hiring hall first? A. Yes, sir.

Q. What were you told at the hiring hall?

A. They told me that it was O. K. Mr. Taylor told me that it was O. K., that any of the boys that wanted to work, why—

Q. Then what did you do?

A. At the time I found out that the boat would be in approximately Friday, November 3rd. I believe, why, that news gets around through our employees, and some of them like to have that work, on account of it being more pay and [82] overtime. So I made up a list like I always do of the different boys that would want to work on that particular boat at that time and told them, the boys, the boys that I knew, that I was not sure how many men the Daisy Gray would require until it arrived and I was able to contact the captain and the first mate. My list consisted of eleven or twelve men that were willing to work on board the Daisy Gray. At the time the Daisy Gray arrived, approximately at twelve o'clock noon of the 3rd, I had previously between, that morning, contacted the longshoremen's hiring hall and they told us they would not be able to furnish only two men. I told that to the captain of the Daisy Gray, that two men was all that he would be able to get from the longshoremen's hiring hall. He and the mate conferred together and said they would need eleven men at one o'clock Friday, November 3rd, so during my lunch hour, that is, between twelve o'clock and one o'clock, you under-

(Testimony of Calvin C. West.)

stand, I contacted different parties I had on this list I had made up and asked them if they cared to go out there at one o'clock. In doing that I tried to not show preference between one department and the other. I am, you see, yard superintendent there and must pick them so as not to show preference.

Q. Did you have a conversation with Mr. Olcott?

A. Yes; previous to that Mr. Olcott asked me when this boat came in if he would have an opportunity to work on the Daisy Gray when she came in. I said to Walter, "Do [83] you want that kind of work?"

He said: "Yes, I would like to get some of it. I would like to get some extra money."

I said: "When the boat comes in I will see if they need men, and I will try to work you in."

Q. What did you say to him after that day?

A. I don't go particularly to date.

Q. Did you speak to him again after the boat arrived?

A. After the boat arrived I said: "The boat is in. There is an opening if you want to go to work."

"O.K.," he said, "I will be there at one o'clock."

Q. Do you know whether he or you contacted anyone else about going to work about getting the job? Let me put it this way: Do you know whether his name was placed on the payroll for that job?

A. Their names are never placed on the payroll until they go on board ship.

Q. Who handles the payroll?

A. The first mate on the ship.

(Testimony of Calvin C. West.)

Q. And do you know his name?

A. His name is Huegenette.

Q. Do you know whether Mr. Olcott's name was placed on the payroll when he went on the ship?

A. I do.

Q. Did you hear anything said about that at the time?

A. No, sir, I have nothing to do with that end of [84] it whatsoever. That is entirely up to the first mate.

Q. That is, you merely tell the man to go to the job?

A. To report to the ship, yes, sir.

Q. Did you take any list to the ship, or to the mate, of the men who would report?

A. Yes, sir, I do that.

Q. Did you give the mate Mr. Olcott's name?

A. I think I did, yes, as an accommodation to the mate, to just check the crew up.

Q. Did you see Mr. Olcott working there after you went on board? A. Yes, sir.

Q. You know he was working on board?

A. Yes, sir.

Q. What is the payroll arrangement, if you know, as to what payroll these men are carried on?

A. The Waterfront Employers Association, the way I understand it, takes care of the entire payroll of outside help that they hire, and then re-bills the boat for that.

Q. Do you know whether Mr. Olcott's name was taken off the Benson Lumber Company payroll?

A. I know it was.

(Testimony of Calvin C. West.)

Q. How do you know it was?

A. His card was O.K.'d out at twelve o'clock that day by Mr. Olcott's foreman. [85]

Q. What do you mean by that?

A. They punch a time clock, or card, and as soon as they punch it out it is then O.K.'d out. The foremen O. K. it out.

Q. In other words, Mr. Olcott was taken off the Benson Lumber Company payroll at noon?

A. Twelve o'clock, yes.

Q. Do you know whether he was paid anything by the Benson Lumber Company for working on the Daisy Gray on this occasion?

A. I know he was not.

Q. Do you know anything about the arrangement between the Daisy Gray, or Freeman Steamship Company, and the Waterfront Employers Association? A. Just hearsay only.

Mr. Pillsbury: Mr. Roberts, can you stipulate to the arrangement between the Steamship Daisy Gray and Freeman Steamship Company and the Waterfront Employers Association with reference to hiring the stevedores and those doing stevedoring work on vessels of the employer in Southern California?

Mr. Roberts: I would stipulate that that is the purpose of that office, but I cannot connect it up with the Freeman Steamship Company, because there is no bit of showing they are a part of the Waterfront Employers Association.

(Testimony of Calvin C. West.)

Mr. Pillsbury: Can you state who provided the money [86] which was used in paying the amount of \$5.83 referred to in Exhibit A, the check sent to Mrs. Olcott in lieu of the check made out to her deceased husband?

Mr. Roberts: No, sir, I cannot.

I will state this, that if I find out that it was paid by the Freeman Steamship Company, that I will stipulate that that was the fact.

Mr. Pillsbury: You can send in a letter giving the results of your information, if that is the case, but, however, the record will remain incomplete until the point is covered.

Mr. Grogan: I propose to prove by witnesses present that we did not pay the deceased, Mr. Olcott, any money after November 3rd.

Mr. Pillsbury: Will you have any witnesses to show who provided the money used to pay his wages on the *Daisy Gray*?

Mr. Grogan: I don't know whether Mr. West knows that or not. It is my understanding that Mr. West does not, I believe.

Mr. Pillsbury: Do you have any information, Mr. West, as to what or who provided the pay which was presumably given to the men working on the *Daisy Gray* for stevedoring at San Diego?

Mr. West: I distributed the checks to the different men, to those on the list, and the last check that he got [87] was for a few hours work on Monday, the 6th, I believe it is.

Mr. Pillsbury: Is that \$5.83?

(Testimony of Calvin C. West.)

Mr. West: Something like that, just for a few hours work. That was sent to Mrs. Olcott by Mr. Harvey. I had him take it out to her.

Q. (By Mr. Pillsbury): Whose check was that?

A. Waterfront Employers Association.

Q. Do you know how the Waterfront Employers Association got the money, or from whom?

A. Definitely, I do not.

Mr. Pillsbury: The point will remain open, then. Mr. Grogan, take the witness.

Q. (By Mr. Grogan): Mr. West, you are superintendent for Benson Lumber Company?

A. Yard superintendent, yes.

Q. During the time that Mr. Olcott worked on the Daisy Gray did you exercise any supervision or control over him? A. None whatsoever.

Q. Did you give him any instructions or directions as to the manner in which he was to perform his work? A. No, sir. [88]

Q. Prior to November 3rd had you had any conversation with Captain Dackman?

A. That's right.

Q. Who is Captain Dackman?

A. He is the captain of the Steamer Daisy Gray.

Q. Do you know by whom he is employed?

A. He is employed by the Freeman Steamship Company.

Mr. Pillsbury: Mr. Roberts, will you stipulate that the Steamship Daisy Gray was in the first week of November, 1944, either owned or contracted for and operated by the S. S. Freeman Steamship Company?

(Testimony of Calvin C. West.)

Mr. Roberts: Yes, I will so stipulate.

Mr. Pillsbury: All right, go ahead, Mr. Grogan.

Q. (By Mr. Grogan): Do you know Norman Hubenette?

A. Yes, sir, that is the first mate.

Q. Do you know a mate on the Daisy Gray who is called Charlie?

A. Yes; his name is really Carl Swenke.

Q. You heard Mr. Newman testify concerning the mate named Charlie?

A. They call him Charlie. His name is actually Carl; Carl Swenke.

Q. So Charlie Swenke and Carl Swenke is one and the same person. And was he on board the Daisy Gray on the 3rd of November? [89]

A. Yes, sir.

Q. You saw him there, did you?

A. Yes, sir, I did.

Q. Had Captain Dackman asked you to get men for him to assist in unloading the ship?

A. Yes, sir.

Q. When was that?

A. I could not definitely say as to date. Probably two or three months previous to that. He said if there was no arrangements made to get unloading, they may not be able to bring the boat in here any more.

Q. You received word from Captain Dackman before November 3rd that the boat would arrive on November 3rd?

A. They don't say as to what time they will arrive; they say what time they left up there. It takes about ninety-six hours thereafter.

(Testimony of Calvin C. West.)

Q. Had Captain Dackman requested you to line up a crew of longshoremen?

A. Not that particular trip.

Q. How did you happen to make the arrangement on this occasion?

A. He requested it at twelve o'clock on November 3rd, that I make arrangements for men. He and Huegenette both requested—that they needed eleven men.

Q. I believe you testified that on November 3rd Olcott was taken off the payroll of the Benson Lumber [90] Company? A. Yes, sir.

Q. You know that of your own knowledge?

A. Yes.

Q. As superintendent, were you aware of who was on the payroll of the Benson Lumber Company on November 3rd? A. Yes.

Q. As superintendent of the Benson Lumber Company did you have supervision and control of the payroll for the employees of the Benson Lumber Company? A. Yes, I did.

Q. And do you know of your own knowledge whether or not Olcott received any pay from the Benson Lumber Company after November 3rd, 1944, at noon? A. I know that he did not.

Q. After noon of November 3rd, of 1944, did you give any instructions or directions to Walter Olcott?

Mr. Roberts: Objected to as asked and answered several times.

Mr. Pillsbury: Objection sustained.

(Testimony of Calvin C. West.)

Q. (By Mr. Pillsbury): Do you know whether the Steamship Daisy Gray was being unloaded under contract with any contract of stevedoring on that occasion?

A. No, I know of no contract, no.

Q. You didn't hear of any contracting stevedores [91] unloading at that time for the ship?

A. No, sir.

Mr. Grogan: I believe that is all.

Cross-Examination

By Mr. Roberts:

Q. Mr. West, was Walter Olcott at the time of his employment by Benson Lumber Company on the monthly payroll? A. Hourly pay.

Q. On the hourly payroll? A. Yes, sir.

Q. And it is your testimony that you keep the payroll record yourself?

A. I have access to it, yes. That is, I don't keep the actual payroll, no, but I have access. I see the cards and the pay checks.

Q. Did you see Mr. Olcott's check for the time he worked for the Benson Lumber Company prior to the time he started to work unloading this cargo?

A. Yes.

Q. How much was it?

A. I could not say.

Q. Did you personally check the payroll yourself for the time that he worked for Benson?

A. No, I did not check his pay card. Mr. Harvey checks that, but I see the card. [92]

(Testimony of Calvin C. West.)

Q. What I want to know is what you know of your own knowledge, Mr. West.

A. Well, I have access to his card.

Mr. Roberts: No, that is not what I want to know. Repeat the question, Mr. Reporter.

(Record read, as follows):

"Q. What I want to know is what you know of your own knowledge, Mr. West."

Mr. Roberts: Read the question before that.

(Record read, as follows):

"Q. Did you personally check the payroll yourself for the time that he worked for Benson?

"A. No, I did not check his pay card. Mr. Harvey checked that, but I see the card.

"Q. What I want to know is what you know of your own knowledge, Mr. West."

A. I can answer yes to that.

Q. When?

A. On Thursday, and I checked it that same day, and also on Monday, the 6th, and also—I beg your pardon, I checked it on Friday, November 3rd, and also on Thursday, which would be November 9th.

Q. For what purpose?

A. To see if it agreed with the amount of time he actually worked for the Benson Lumber Company. [93]

Q. (By Mr. Pillsbury): Is this payroll made up in the department in which you have supervision? A. No.

(Testimony of Calvin C. West.)

Q. (By Mr. Roberts): As a matter of fact, the payroll records are kept and maintained in the office, aren't they, and they are not under your jurisdiction at all, they are in the office manager's jurisdiction? A. That's right.

Q. A moment go you testified that you had a conversation with the master of the Daisy Gray to the effect that unless there was sufficient manpower here, that they would not be able to come in any more. Is that right? A. That's right.

Q. What effect, if any, would that have had on the Benson Lumber Company?

A. It would have shut off their source of supply.

Q. So that it was, therefore, to the Benson Lumber Company's advantage to have manpower available, is that right, to unload the ship?

A. I would say so, yes.

Q. So far as the part that was consigned to them is concerned?

A. That's right, only. [94]

Q. (By Mr. Pillsbury): In connection with this trip of this boat in the first week in November, do you know whether there was any lumber on the boat consigned to other parties at San Diego?

A. I do. There was.

Q. (By Mr. Grogan): And did this same crew of stevedores unload that part of the cargo?

A. They did.

Q. And did they do that on Sunday, November 5th?

(Testimony of Calvin C. West.)

A. Saturday and Sunday. But Walter Olcott was not on the job on Sunday, but the same crew did.

Q. And Walter Olcott was on the job on Saturday? A. That's right.

Q. And he aided in unloading that proportion of the cargo that you had nothing to do with?

A. That's right, that was consigned to somebody else.

Q. (By Mr. Liggett): Are you familiar with a sheet of paper which I will hand you, Mr. Grogan, which reads, "Walter Olcott, period ending November 8, 1944"? A. Yes, sir.

Q. What is it?

A. This is an employee's copy of the pay roll that he received for the period ending November 8th.

Q. (By Mr. Pillsbury): For what employer?

A. For the Benson Lumber Company.

Q. (By Mr. Liggett): That was attached to the pay check, was it not? A. Yes, sir.

Q. Are you able to look at it and tell for what period of time that check was paid for? That is, what period of work that covers?

A. Yes, sir; Thursday, eight hours, Thursday, November 2nd; four hours Friday, November 3rd.

Q. That is noted on the check, is it?

A. No, sir, noted on the time card.

Q. Where did you get those figures you have just given us?

A. Well, from his time card in the main office.

(Testimony of Calvin C. West.)

Q. (By Mr. Pillsbury): Do those figures appear on the slip you have in your hand?

A. No, the dates do not appear. It just shows so many hours.

Mr. Roberts: I move to strike it on the grounds that it is hearsay.

Mr. Liggett: Will you look at this also?

Mr. Pillsbury: The slip referred to will be received in evidence as Exhibit B. Any other questions of Mr. West? [96]

Q. (By Mr. Grogan): I believe when this witness was testifying there were two slips before him. Will you look at this Exhibit B again and say what that represents?

Mr. Roberts: I have a motion to strike out testimony as to what that slip shows.

Mr. Pillsbury: Motion denied. The record is clear and it has already been asked and answered. Anything else there, Mr. West?

Mr. West: No.

Mr. Pillsbury: That is all, Mr. West. Next witness.

RANSOM HARVEY

being first duly sworn, testified as follows:

Direct Examination

By Mr. Pillsbury:

Q. What is your name?

A. Ransom Harvey.

Q. Your address, Mr. Harvey.

A. 2062 Irving Avenue.

(Testimony of Ransom Harvey.)

Q. San Diego, California? A. Yes, sir.

Q. What is your occupation?

A. Mill foreman, assembly foreman.

Q. By whom were you employed in November of last year? [97]

A. Benson Lumber Company.

Q. Did you know Walter Olcott, who died on November 12th? A. Yes.

Q. Was he working under you?

A. Well, it is kind of a combination. He wasn't working under me that day. We only run the mill one day, a half a day, a week.

Q. Do you know anything about the circumstances under which he went to work on the Steamship Daisy Gray on November 3rd?

A. I know he was working there, and I O.K'd his card out at twelve o'clock noon.

Q. Do you know whether he was paid any wages by the Benson Lumber Company for doing any work on the Daisy Gray?

A. No, not that I know of. He could not have.

Q. Do you know what payroll men are carried on who were stevedoring on the Daisy Gray at that time?

A. I have seen their checks that they received, that is all I have seen.

Q. Was the work carried on, the work on the Daisy Gray, carried on any payroll of the Benson Lumber Company? A. No.

Q. The checks were from the Waterfront Employers Association? A. Yes, sir. [98]

(Testimony of Ransom Harvey.)

Q. Do you know anything about the Waterfront Employers Association, what it is?

A. Not a thing.

Q. (By Mr. Grogan): Was it part of your job as an employee of the Benson Lumber Company on November 3rd last year to handle the payroll and time cards of the employees?

A. Of the employees that regularly worked for me, yes.

Q. And Walter Olcott worked under you?

A. Not that day.

Q. I mean on November 3rd.

A. I O.K.'d his card out.

Q. You had direct supervision and charge of the time card and keeping track of the hours of Olcott prior to the time of his accident?

A. Yes; sometimes Mr. West took care of that, too, there, and we worked together.

Q. Did you check out Mr. Olcott on November 3rd at noon? A. Yes, sir.

Q. And was he carried on your time record or time slips after that? A. No, sir.

Mr. Grogan: That is all.

Mr. Roberts: No questions.

Mr. Pillsbury: That is all. Thank you. Mr. Grogan, [99] any other witnesses?

Mr. Grogan: I would like to call Mr. Taylor.

CHARLES O. TAYLOR

being first duly sworn, testified as follows:

Direct Examination

By Mr. Pillsbury:

Q. Your full name, please.

A. Charles O. Taylor.

Q. What is your address?

A. 3543 Grim, San Diego, California.

Q. Your occupation?

A. I am the business representative of the Millman's Union, Local 2020.

Q. Did you know Walter Olcott who died on November 12th?

A. Only as a member; not intimately.

Q. Have you any knowledge as to what nature of an arrangement stevedoring work was being performed on the Steamship Daisy Gray between November 3rd and 6th, or thereabouts, of last year?

A. Yes, I was familiar with the arrangement, because the request was made of me to make arrangements with the Longshoremen so that there would be no union trouble during the time that the men were employed on the ship.

Q. Do you know who employed these men on the Daisy [100] Gray in that week?

A. That was handled by the representative of the longshoremen of this area, Mr. French, who is a business representative like myself. He had jurisdiction of the men at the time they left the employment of the Benson Lumber Company.

Q. Do you know anything about what payroll the men were carried on?

A. Only by hearsay from the men.

(Testimony of Charles O. Taylor.)

Q. Do I understand from previous testimony that two men were sent over from the longshoremen's hiring hall, and Benson Lumber Company rustled up the rest of the men for that job? Is that your information? A. That is correct.

Q. And the other men were members of your organization, including Olcott?

A. That's right.

Q. (By Mr. Grogan): Olcott was a member of the A. F. of L.? A. That's right

Q. And as a longshoreman he had to get the approval of the C. I. O. to work as a longshoreman?

A. Yes, sir.

Q. And you arranged for that?

A. Yes, I had blanket approval.

Q. Did you do anything in that connection with the [101] United States Employment Office?

A. No. I took it to the War Manpower Commission of this area.

Mr. Pillsbury: May I interrupt, Mr. Grogan? What I need to know is what employer carried this man and these men on their payroll for this particular job, and directed the work.

Mr. Grogan: I bring out this testimony merely to show that they were removed from where they were employed out to another place.

Mr. Pillsbury: That still does not show me anything new or throw any direct light on the employer.

Mr. Grogan: That is all.

Mr. Pillsbury: That is all. Next witness.

Mr. Grogan: I will call Mr. Roberts.

CLIFFORD E. ROBERTS

being first duly sworn, testified as follows:

Direct Examination

By Mr. Pillsbury:

Q. What is your name?

A. Clifford E. Roberts.

Q. Your address?

A. 2536 Montclair Street, San Diego.

Q. Your occupation or profession?

A. Manager, Benson Lumber Company. [102]

Q. Were you such in the first week of November of last year? A. Yes, sir.

Q. Do you know anything about the arrangements under which this crew of stevedores was working on the steamship *Daisy Gray* in the first week of November of last year?

A. In this particular instance, yes. We get a wire from the stevedoring company, the independent stevedoring association, when the boat leaves the north, Coos Bay, giving the approximate time when she will arrive here.

Q. Who is the stevedoring company at Coos Bay?

A. That is the Independent Stevedoring Company.

Q. Go ahead.

A. And the captain wires us, and then Mr. West takes over the job of figuring or finding out from Mr. French—we call him “Frenchie”—at the longshoremen’s hiring hall, whether he can furnish men, and in this particular instance they told us that they had about 250 stevedores down from San

(Testimony of Clifford E. Roberts.)

Pedro taking care of these convoys going out of here, and consequently he would not be able to give us only one or two men, and so I got in touch with Mr. C. O. Taylor in order to get permission for our men who had volunteered for this work to work under C.I.O. jurisdiction.

Q. Do you know what payroll these men were upon while they were working on the Daisy Gray?

A. Just that they would be working for the boat, for the [103] Freeman Steamship Company.

Q. Were they doing any work for the Benson Lumber Company while they were in the boat?

A. No, sir.

Q. Did they receive any pay from the Benson Lumber Company for the work in the boat?

A. No.

Q. Do you know whether or not the Benson Lumber Company supervised their work during the discharge of the cargo of the boat?

A. No, sir; while they were on the boat they were working for the mate—not the mate, but the—

Q. Do you know what the Waterfront Employers Association is?

A. No, sir, I am not familiar with them. I know the checks came through them, because Mr. West requested me to go down there once to pick up the checks to pass out.

Q. The pay checks for the work done on the Daisy Gray, for longshoremen coming from the Waterfront Employers Association of California, is that right?

(Testimony of Clifford E. Roberts.)

A. Yes, that's right. I went down and picked up the checks for Mr. West.

Q. Do you know whether the stevedoring work on the Daisy Gray was ever done by any stevedoring contractor?

A. No, I don't know anything in respect to that, whether they were working on a contract, or what they were [104] doing; no, I don't know anything pertaining to that.

Q. Did you ever hear of the work being done under contract? A. No, I don't think I have.

Q. Did the San Diego Stevedoring Company, or the Atlas Company, if there is such a company, or the Crescent Wharf and Warehouse Company, or the Metropolitan Stevedoring Company, do any of the unloading of the Daisy Gray?

A. No, I don't think so. I think the way they handled it is that the boat comes in and they request San Diego stevedores to do that work.

Q. The boat handles it directly?

A. Yes, sir.

Q. (By Mr. Grogan): Mr. Roberts, do you know of your own knowledge whether Mr. Olcott was on your payroll after noon on November 3rd?

A. No.

Q. You mean you don't know, or that he was not employed?

A. I don't know anything about the accident. Mr. West makes the selection, so I had no knowledge of that.

(Testimony of Clifford E. Roberts.)

Q. Have you examined the books of the Benson Lumber Company to determine whether or not Olcott was paid any wages after noon of November 3rd, 1944?

A. No, I haven't. I know I have paid him a benefit [105] fund, which is the employee's benefit fund that we have there, where we pay the death benefit, and that was paid.

Q. That was something separate and apart from any wages?

A. That's right, nothing to do with wages.

Mr. Grogan: That is all.

Q. (By Mr. Roberts): Do you know what portion of the cargo aboard the Daisy Gray that came in here on November 3rd was consigned to Benson Lumber Company?

A. We have the records at the office, but I would not have anything to say on that boat.

Mr. Roberts: That is all.

Mr. Grogan: No further questions.

Q. (By Mr. Liggett): Do you know what this slip is here? Are you familiar with it?

A. No, I don't know what it is for.

Mr. Liggett: That is all, thank you.

Mr. Pillsbury: Next witness.

Mr. Grogan: I have no further witnesses.

Mr. Pillsbury: Mr. Roberts, I will take your evidence.

Mr. Roberts: The only evidence I have is in connection with Mr. Olcott.

Mr. Pillsbury: I thought you were going to submit [106] some medical reports.

Mr. Roberts: I will submit them now. I would like to question Mrs. Olcott with reference to her marriage.

Mr. Pillsbury: That I will postpone until the rest of the case is in.

Mr. Grogan: Mr. Pillsbury, if the evidence is unsatisfactory as to whether or not any wages were paid to Mr. Olcott after November 3rd, 1944, by the Benson Lumber Company—

Mr. Pillsbury: I have never seen a case in which there is any more evidence on the same point. There is no doubt in my mind at the present time.

Mr. Roberts: I will stipulate, Mr. Liggett, that that is or purports to be an employee's earnings and deductions statement of Walter Olcott for the period ending November 4, 1944, which shows a gross earnings in the amount of \$24.20, also showing social security and federal withholding and benefit deductions, issued by the Waterfront Employers Association of California.

Mr. Liggett: Then referring to item 18 on the other side, will it be stipulated that the Daisy Gray is one of the steamships served by the association?

Mr. Roberts: No, I could not stipulate to that.

Mr. Pillsbury: It may be received in evidence as Exhibit C. This document is on a printed form entitled, "Waterfront Employers Association of California." The [107] material on the front refers to Olcott, with certain data which has been referred

to. The material on the back is a printed list, entitled, "Company Code Numbers." Contained in the list, number 18 on the list, is, "S. Daisy Gray and owners."

Now, Mr. Roberts, I will take all the rest of your case at this time. There is a report of November 15, 1944, from R. O. Peck, M.D., which will be received in evidence as Exhibit D.

Mr. Roberts: I have nothing further in the way of documentary evidence.

Mr. Pillsbury: Have you any witnesses?

Mr. Roberts: No, sir; none except Mrs. Olcott.

Mr. Pillsbury: It is now one o'clock, and we will adjourn until two o'clock. And is it understood that the only matter to be taken up at that time is further examination of Mrs. Olcott at Mr. Roberts' request?

Mr. Grogan: I would like to talk to Mr. Thomas during the lunch hour to see whether or not we have anything further.

Mr. Pillsbury: All witnesses are excused except Mrs. Olcott, and I will resume with her testimony at two o'clock this afternoon.

(Recess.) [108]

Two o'Clock P.M.

Mr. Pillsbury: Hearing resumed at two o'clock p.m., same appearances. Mr. Liggett asks for production of information by the Firemen's Fund Insurance Company of the status of Freeman Steam Company and the Waterfront Employers

Association, as this is a matter within the knowledge of the said employer. Mr. Roberts, could you now enter into a stipulation that the Waterfront Employers Association is an association of companies engaged in port and harbor maritime work, principally stevedoring; that it acts for its member companies in part to maintain a central record office of the hiring of longshoremen by its members and in part to maintain a central pay office to which longshoremen hired by its members are paid centrally for work performed for the various members of the association by funds contributed by the different members of the association for such purposes? I am speaking now of matters of general knowledge that you and I and Mr. Liggett know about and which should be made a part of the record at some proper time.

Mr. Roberts: I will so stipulate.

Mr. Pillsbury: In other words, each member of the association sends to the central pay office funds to meet the payroll of work performed for each such member weekly, and that the amounts are then paid from the central pay [109] office.

Mr. Roberts: I can't go any farther than the original stipulation.

Mr. Pillsbury: Very well. Will you stipulate, Mr. Roberts, that the Waterfront Employers Association does not itself do any stevedoring work in the contract with ships?

Mr. Roberts: I cannot stipulate to that. I do not know it to be a fact. I assume it to be a fact.

Mr. Liggett: Is Mr. Roberts in a position to stipulate that the Freeman Steamship Company used the services of the Waterfront Employers Association for the procuring of stevedores for the Daisy Gray in the port of San Diego in the period between November 3rd and November 6th, inclusive, of 1944?

Mr. Roberts: No, I cannot do that. I will, however, make inquiry, and if they are, I will place that matter in the record.

Mr. Pillsbury: I think you have a *prima facie* case of that type through Exhibit 6. Anything else?

Mr. Liggett: No. [110]

CORA E. OLCOTT

previously sworn, recalled for completion of cross-examination, testified as follows:

Cross-Examination

(Continued)

By Mr. Roberts:

Q. Mrs. Olcott, I think I asked you this question about noontime, and I don't remember whether you gave me an answer. Did you examine Mr. Olcott to see if there were any marks or bruises or swelling on any part of his body? A. Why, yes.

Q. Was there any such evidence of injury?

A. No, it is all inside.

Q. When Mr. Olcott came home on the afternoon of November 6th, had he seen the doctor at that time? A. No, not that I know of.

(Testimony of Cora E. Olcott.)

Q. When did he see the doctor?

A. The next day, Tuesday.

Q. That would be November 7th?

A. Yes, sir.

Q. Did he see the doctor on November 8th?

A. Yes, sir.

Q. And on November 9th? A. Yes.

Q. Where did he see the doctor on those dates?

A. At his office.

Q. He went to the doctor's office every day? Is that right? A. Every day.

Q. His condition became worse?

A. Until Friday, he wasn't able to go.

Q. That was the 9th, was it?

A. On the 10th.

Q. How did he get to the hospital?

A. The neighbors took him.

Q. Did you notify Dr. Peck that he could not come to the office?

A. He knew himself on Friday.

Q. Had Mr. Olcott ever been in any other accident? A. No.

Q. He had never lost a day's time from work on account of any injury? A. No.

Q. As far as you know?

A. No, not as far as I know, but I knew him over nineteen years.

Q. Did he have a hernia before this accident?

A. No, he had nothing. He never had a cold in his life, or anything; never took a dose of medicine.

(Testimony of Cora E. Olcott.)

Q. With reference to your marriage, you stated that you were married in Tijuana on August 26th, is that what [112] you said, of 1926?

A. Yes, that is the only time he was off from his work.

Q. Can you tell me where in Tijuana you were married? A. I don't know.

Q. Do you know whether it was an official government building, or was it a church?

A. It was not in a church.

Q. Not in a church?

A. No. I don't remember. It has been so long ago, and we never had thought of the thing before.

Q. Do you know whether it was a minister or an official of theh government that married him and you, or a priest?

A. It was not a priest. He was something of a— Well, I don't know what he was. He did that all himself, I didn't have anything to do with it.

Q. You were there?

A. Yes, I was there when the ceremony was performed.

Q. Who else was present?

A. Some Spanish fellow and his wife.

Q. Did you know this Spanish fellow?

A. I don't know them. They introduced me to them, but I did not know who they were.

Q. You were introduced to them at the ceremony? A. Yes, as a witness. [113]

Q. You had never seen them before?

A. No.

(Testimony of Cora E. Olcott.)

Q. Were they friends of Mr. Olcott?

A. They were acquaintances. I did not ask them if they were his friends. He knew everyone there. I did not know anyone.

Q. After you were married did you obtain some sort of a paper from the person performing the ceremony?

A. Yes, got a paper, a certificate like my first marriage, as I understand it.

Q. Was it in English or in Spanish?

A. I think it was both, I think it was. Our names were written in English.

Mr. Roberts: That is all.

Q. (By Mr. Grogan): Do you have a marriage certificate?

A. No, I misplaced it; I don't know where it is. I don't keep papers anywhere. I haven't kept any.

Q. Have you endeavored to get a copy of it?

A. Yes. We could not find it.

Q. Have you gone to Tijuana or sent anyone to Tijuana to get a copy of the marriage certificate?

A. Yes, I went down to Tijuana to see if I could locate the place, but I could not find it, because I haven't been there for eighteen years, you see.

Q. When did you go? [114]

A. I don't remember. It has been a month; maybe two or three weeks.

Q. Did you inquire at the government offices there? A. Yes, that is where I went.

Q. And they told you they had no record of it?

A. They could not find it.

(Testimony of Cora E. Olcott.)

Q. Did they tell you whether or not they had a record of it?

A. They did not say whether they had ever had any or not, but they could not find that then.

Q. They could not find a record of it?

A. That's right.

Q. (By Mr. Pillsbury): Have you lived with Mr. Olcott continuously since August 26, 1926, as his wife? A. Every day, yes.

Q. You lived publicly together as husband and wife? A. Publicly and honorably.

Q. During the whole time? A. Yes.

Mr. Pillsbury: I have no further questions.

Mr. Roberts: I will request a continuance of at least fifteen days to enable me to make such inquiry and investigation with reference to, first of all, the marriage and divorce, or at least the divorce from Mr. Hartshorn, and the marriage at Tijuana. I will require at least fifteen [115] days to do that.

Mr. Grogan: I would also like a say in that.

Mr. Liggett: I will have no objection to it.

Mr. Pillsbury: The hearing will remain open for three weeks, during which time either side may request further proceedings upon proper showing of necessity. If I don't receive any request for further proceedings or further time within the three weeks mentioned, I will consider the matter ready for submission, without further notice, for a decision.

Mr. Liggett: I have a witness here who knows something about the matter of the marriage, at least saw the certificate. He came in at noon, and if you want to hear from him, I would like to put him on.

Mr. Pillsbury: Very well.

JOHN ROBERTS

being first duly sworn, testified as follows:

Direct Examination

By Mr. Pillsbury:

Q. What is your name?

A. John Roberts.

Q. What is your address?

A. 3171 F Street, San Diego 2, California.

Q. What is your occupation?

A. I work in a laundry. [116]

Q. Do you know Mrs. Olcott here?

A. I do.

Q. How long have you known her?

A. Oh, about nineteen or twenty years.

Q. And did you know Mr. Olcott?

A. Very well.

Q. How long did you know him?

A. Since about nineteen or twenty years, along in there.

Q. What information have you with reference to the marriage of Mr. and Mrs. Olcott?

A. Well, we were intimate friends, very intimate. He came to me when he was going to lay off, and he said, "Jack, I am going to get married." And he said, "Don't say anything, just keep it quiet." And he went away and got married, laid off a week, and he came by our house and was going

(Testimony of John Roberts.)

to rent a house, and we lived on 36th Street at the time, in the 4300 block, and he brought Mrs. Olcott—that was the first time I ever saw her—brought her and took her, and my wife, and we went down to see the house he was going to rent on 47th Street, and that was in the 4200 block on 47th, and he told me he was married. We used to say almost anything to each other, because we were so intimate. I said, "What did you do? You went down there! Couldn't you find a priest in San Diego?"

He said, "I didn't get married by a priest. We got [117] married by a preacher."

He took the license out of his pocket, and I can't tell you much about it. I saw it was a marriage license. That was eighteen years ago.

Q. Did you notice what language it was in?

A. Yes; it was in Spanish.

Q. (By Mr. Liggett): Where were you working at that time?

A. I was working at the Benson.

Q. Did you and Mr. Olcott both work at the Benson Lumber Company together?

A. Yes, for years, many years. I worked for Benson Lumber Company in the nineties.

Q. (By Mr. Grogan): Do you know if Mr. and Mrs. Olcott lived together as husband and wife from that time on?

A. I do. He introduced himself as her husband, and her as his wife.

Q. Can you read Spanish?

(Testimony of John Roberts.)

A. No, I can't say I do. I know it when I see it. I can't read it, but I can tell you it is Spanish. I can't talk it, either.

Q. (By Mr. Roberts): Mr. Roberts, how do you know it was a marriage certificate?

A. How do I know? How would you know?

Mr. Pillsbury: Answer the question.

A. I know by looking at it, of course.

Q. How?

A. Well, I don't know just how you want me to define that.

Q. What did the paper look like to you?

A. It looked like an official paper. It was a license. There was "Licencia" there; I saw that. And, of course, "Licencia," in Spanish, is, "License," in English. It is pretty near the same as it is in English, very much the same.

Q. How big was the paper?

A. Oh, about perhaps the size of that, somewhere near that. A certificate form.

Q. About half the size of a letterhead, or two-thirds letter size, perhaps?

A. Something like that.

Q. Did it have any seal on it?

A. It did, but I never paid any attention to the seal. He just showed it to me. I wasn't interested in it, and I did not think I would have to say about it twenty years later.

Mr. Roberts: That is all.

Mr. Liggett: That is all.

Mr. Grogan: That is all.

Mr. Pillsbury: Anything else? [119]

The Witness: He introduced her to my wife and I as, "My wife, Mrs. Olcott."

Mr. Pillsbury: All right. Thank you, very much.
Hearing closed. [120]

EXHIBIT A

Waterfront Employers Association of California,
Kress Building, 122 West Fifth Street, Long
Beach 2, California.

December 16, 1944

Liggett & Liggett
Attorneys at Law
502 U. S. National Bank Bldg.
San Diego, California.

Reference: File No. 822-56

Walter Olcott, Deceased

Gentlemen:

In reply to your letter of December 11 and after receiving affidavit of surviving widow, please find attached our check number 246 in the amount of \$5.83 made out to Cora Olcott.

This check is being presented in lieu of check number M 33922 which was made out to her deceased husband.

Yours very truly,

WATERFRONT EMPLOYERS
ASSN. OF CALIF.

/s/ E. J. BAIRD

Asst. Secretary-Treasurer

CJB/nj

EXHIBIT "B"

Exhibit

BENSON LUMBER CO.
SAN DIEGO, CALIFORNIA

THIS IS A STATEMENT OF YOUR
EARNINGS AND AUTHORIZED
DEDUCTIONS MADE BY

EMPLOYEE'S NAME

Walter Olcott

STANDARD ENOUGH TIME	REG. RATE	OTIME RATE	OTIME MIN.	TOTAL EARNINGS	DEDUCTIONS			AMOUNT OF CREDIT
					REG.	O.T.	ADV.	
11-8-44	12			12.56	.12	.12		

TRANSMISSION NO. 130140

DETACHMENT FIVE

M 32832

WATERFRONT EMPLOYERS' ASSOCIATION OF CALIFORNIA

EMPLOYEE NO. U. S. EMPLOYER		EMPLOYER'S LAST NAME		TAX CLASS	WEEK ENDING		
		X 10110LCOTT			MO.	DAY	YR.
CO. CODE	GROSS WAGES	S.U.L.	F.O.A.B.	DEDUCTIONS	BONDS	ADJUSTMENTS	
210	2420	24	24				
TOTAL CAR FARE	2420	24	24	30	2342		
	TOTAL GROSS WAGES	S.U.L.	F.O.A.B.	INCOME TAX		TOTAL NET WAGES	
			DEDUCTIONS				

SAVE THIS STATEMENT FOR FUTURE REFERENCE

EMPLOYEE'S EARNINGS AND
DEDUCTION STATEMENT
WATERFRONT EMPLOYERS' ASSOCIATION OF CALIFORNIA

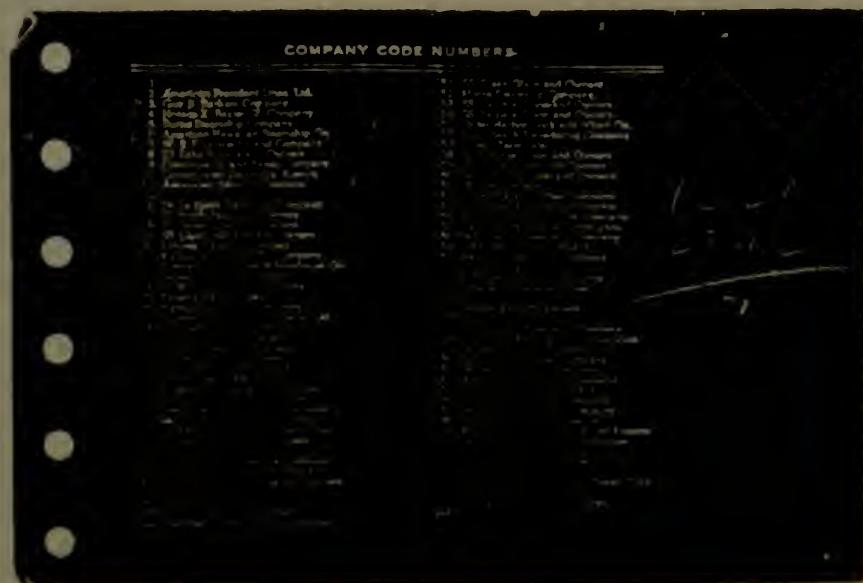


EXHIBIT D

R. O. Peck, M.D.

1011 Medico-Dental Bldg., San Diego 1, California

15 November 1944

Mr. Harry Le Barron

Fireman's Fund Indemnity Co.

608 San Diego Trust & Savings Bank Bldg.

San Diego 1, California

Reference: Mr. Walter Olcott

Longshoreman

Employer: S. S. Freeman Steamship
Co.

Date of injury: November 6, 1944

Dear Mr. Le Barron:

* * *

Comment: Apparently, the patient was lifting and under the strain forced a small portion of the small intestine into the internal inguinal ring. This caused a fixation of the ileum which resulted in gangrene of $\frac{1}{4}$ inch of the intestine, perforation and peritonitis. Also, the fixation of the small bowel resulted in volvulus during a period of three or four days.

The patient's general condition was very poor. His low leukocyte count, his age and cyanosis were poor prognostic signs. However, the only possible hope was to eliminate the intestinal obstruction and close the perforation.

In my opinion this is a compensable injury and death resulted from abdominal strain sustained while working.

An autopsy was performed under the direction of the Coroner's office.

Yours truly,

By /s/ R. O. PECK, M.D.

ROP: if [124]

State of California,
County of San Diego—ss.

I, Charles C. Otis, a Shorthand Reporter called on behalf of the Deputy Commissioner, do hereby certify that the above and foregoing is a full, true, and correct transcript of the proceedings had and testimony adduced at the hearing in the above entitled matter on the date and at the place mentioned.

San Diego, California, March 30, 1945.

/s/ CHARLES C. OTIS,

Shorthand Reporter. [125]

Received April 3, 1945, District No. 13.

Copy Forwarded to Washington. [126]

United States Employees' Compensation Commission. Before Hon. Warren H. Pillsbury, Deputy Commissioner Thirteenth Compensation District.

[Title of Cause.]

REPORTER'S TRANSCRIPT

San Diego, California

Wednesday, May 23, 1945. [127]

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS AT HEARING

Pursuant to Notice, this matter was heard before Hon. Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission, in the Jury Room of the Municipal Court, County Court House, San Diego, California, on the 23rd day of May, 1945, at 11:00 o'clock a.m.

Appearances: Claimant present in person; Liggett & Liggett, By Ruel H. Liggett, Esq., for the Claimant; Murray H. Roberts, Esq., for Freeman Steamship Co. and Fireman's Fund Insurance Co.; S. J. Grogan, Esq., for Benson Lumber Co. and Pacific Employers Insurance Co.; [128] Gerald C. Thomas, Esq., for Benson Lumber Co.

Mr. Pillsbury: Continued hearing, at the request of Murray H. Roberts, Esq., attorney for defendant company Fireman's Fund Insurance Company and Freeman Steamship Company.

The further hearing was requested to produce the testimony of witnesses with reference to the marriage of Mr. Olcott.

Mr. Roberts: Yes, and also to take the testimony of an expert witness as to what the Mexican law was at the time of the alleged marriage.

Mr. Pillsbury: Claimant is present in person, accompanied by R. H. Liggett, Attorney at Law; Defendant Freeman Steamship Company and Fireman's Fund Insurance Company are represented by Murray H. Roberts, Attorney at Law; Defendants Benson Lumber Company and Pacific Employers Insurance Company are represented by S. J. Grogan, Attorney at Law; and G. C. Thomas is here representing the Benson Lumber Company.

The only question to be taken up will be that of the marriage.

Mr. Roberts: We will call Mrs. Olcott. [129]

CORA E. OLCOTT

having been previously sworn by the Deputy Commissioner, on being recalled to the stand, testified as follows:

Direct Examination

By Mr. Roberts:

Q. Mrs. Olcott, through your attorney you have filed a suit against the Fireman's Fund Insurance Company?

Mr. Pillsbury: You mean the present proceeding?

Mr. Roberts: Yes. You will stipulate to that, will you not, Mr. Liggett?

Mr. Liggett: Yes, I will stipulate to that.

Mr. Pillsbury: Do you refer to the present proceeding, the case here before me?

(Testimony of Cora E. Olcott.)

Mr. Liggett: I think counsel refers to a civil action in the Superior Court for the purpose of establishing the fact of marriage.

Q. (By Mr. Roberts): Do you remember, Mrs. Olcott, when Mr. Gallagher took your deposition on February 20th here?

A. Yes. What do I have to remember?

Q. Do you remember Mr. Gallagher asking you certain questions? A. Yes.

Q. In order to be definitely sure of the exact date that your marriage to Mr. Olcott took place, will you again tell me when it was? [130]

A. It was in August, '26, or August, 1926.

Mr. Pillsbury: Has there been any decree of the court to establish that?

Mr. Liggett: No, there has never been any hearing in the matter.

Q. (By Mr. Roberts): You and Mr. Olcott went to Tijuana by yourselves, did you not?

A. Yes, sir.

Q. And there were no friends or acquaintances that were with you? A. None.

Q. And did you personally file any application for a marriage certificate?

A. Before I went, you mean?

Q. At any time?

A. No. We got the papers down there where we went to get married.

Q. You did not sign any papers yourself?

A. No. I guess I must have signed papers. They had papers.

(Testimony of Cora E. Olcott.)

Mr. Pillsbury: May I ask, Mrs. Olcott, did you find the marriage certificate that was referred to in the last hearing?

The Witness: No, I haven't found it.

Mr. Pillsbury: Go ahead. [131]

Q. (By Mr. Roberts): What did you personally have to do in getting the papers?

A. I didn't do much of anything. We went there some place and was married, and he called in a couple that he knew, and that is all there was to it. He gave him some money and we went.

Q. You mean he called in two witnesses?

A. Yes, sir.

Q. You did not know them yourself?

A. No. They were friends of his; acquaintances down there. He was very well acquainted down there. I did not know anyone.

Q. Do you know how long Mr. Olcott had known these witnesses?

A. No, but he was well known in Tijuana for a long time.

Q. You did not make the application yourself?

A. No.

Q. Were you with Mr. Olcott when he made the license or wrote out the application?

Mr. Pillsbury: Just a moment. What is the purpose of this inquiry, Mr. Roberts?

Mr. Roberts: I am laying a foundation for testimony by an expert witness.

Mr. Pillsbury: Did you find any record at Tijuana? [132]

Mr. Roberts: No, sir.

(Testimony of Cora E. Olcott.)

The Witness: Lots of people don't find their records down there, either.

Mr. Roberts: I had hoped to have present the Civil Registrar in Tijuana, but he informed me that under Mexican law he could not come here to testify, and in view thereof I have obtained an affidavit in Spanish, and I will show you the document.

Mr. Liggett: I would not stipulate to the introduction of this affidavit, because it would preclude my cross-examination of the clerk, or the man who made it, and I am satisfied that he did not make a full search of the matter because I talked to him myself.

Mr. Roberts: I have here an affidavit in Spanish by the Civil Registrar, with the certification thereon of John F. Fitzgerald, Vice Consul of the United States of America, together with the English translation thereof, which I will offer in evidence on behalf of the Defendant Fireman's Fund Insurance Company.

Mr. Liggett: I will object to the introduction of it on the grounds that it is incompetent and on the further grounds that it is not taken as a deposition, nor is it subject to cross-examination.

Mr. Pillsbury: Objection sustained.

Q. (By Mr. Roberts): Mrs. Olcott, have you made any effort to obtain a [133] certificate of your marriage at Tijuana?

A. Yes, I looked as far as I could go. I did not know where the place is where we was in. There was a number of places there to get married at that time.

(Testimony of Cora E. Olcott.)

Q. When did you attempt to get a certificate?

A. Oh, I don't know. It has been a month ago, I guess.

Q. Where did you go at that time?

A. I don't even know that, now. We went there some place. I guess the folks there know better than I do about that.

Q. Was there someone here that went with you at that time? A. Yes.

Q. Were the witnesses who were present at the time the marriage ceremony was performed Americans? A. No, they were Mexicans.

Q. And you had never seen either one of them before?

A. No. I might and I might not have. I did not pay any particular notice to them.

Q. Do you know who performed the marriage ceremony?

A. No, I don't. I supposed at the time it was the Judge. That is what I supposed.

Q. Did he wear any kind of a uniform, such as a priest, or a preacher might wear?

A. No; it was not a priest, because I did not have a priest. [134]

Q. You are sure it was not a priest?

A. Yes.

Mr. Roberts: That is as far as I can go.

Cross-Examination

By Mr. Liggett:

Q. You stated in answer to a question asked you by counsel regarding papers that were signed there

(Testimony of Cora E. Olcott.)

at that time, that you did not know what you signed. Do you remember where it was that signed any of the papers?

A. No. In that little bureau of some kind that they get married in. There were others getting married there, so I guessed it was all right.

Q. When counsel asked you the question if you made an application yourself, I believe your answer was in the negative. What did you mean when you referred to an application?

A. That I went to look for it.

Q. He asked you about at the time of your marriage if you made an application for a license. What did you mean when you said you did not make an application?

A. I did not myself. He did. He got it himself.

Q. (By Mr. Pillsbury): What do you understand by the word "application"?

A. I don't know exactly what you mean by it, unless it was when you get your marriage. [135]

Q. (By Mr. Liggett): Were you with Mr. Olcott at all times? A. Yes.

Q. You were with him, right with him?

A. Yes, I went right with him. But I was married before and I never seen no license.

Q. Do you know what papers were produced for the signature of yourself and Mr. Olcott on that occasion?

A. As far as remembering what they looked like, I could not remember what they looked like.

(Testimony of Cora E. Olcott.)

Q. Were there some papers?

A. Yes, I had the paper. He gave it to me to take care of, but I never took care of it.

Q. Is it a fact, then, that you have no fair recollection as to what papers there were or how many there were or who signed them?

A. No, I don't.

Q. After the marriage ceremony had been performed, did either you or Mr. Olcott get a paper of some kind that you were permitted to keep or bring home with you?

A. Yes, I had a paper.

Q. How long did you have it?

A. I don't know. It has been nineteen years, and it has been hard years; it has been nothing but work.

Q. I understand that, but I want to know what you did with it. Did you bring it home? [136]

A. Yes. I brought it home.

Q. And you kept it for a time?

A. Yes, sir.

Q. But you don't know what became of it?

A. Yes, I remember of seeing my first one too, my first certificate, but I don't know what I did with them. I can't find them.

Mr. Liggett: I think that is all. We have nothing else in response to questions you have asked.

Mr. Roberts: We may have something else on redirect, later.

Mr. Pillsbury: You may recall her later.

Mr. Roberts: I have Mr. Jesus Ruiz, whom I will call as a witness. Mr. Ruiz does not speak English. I have here Mr. Fred Noon, a local attorney, who will interpret.

Mr. Liggett: I ask for Mrs. Olcott to change seats with another gentleman so I can have another interpreter.

Mr. Pillsbury: Yes, bring another chair or two up, please.

Fred Noon, Esq., is duly sworn by the Deputy Commissioner to act as interpreter. [137]

JESUS RUIZ

having been first duly sworn by the Deputy Commissioner, through the Interpreter, testified as follows:

Direct Examination

By Mr. Roberts:

- Q. What is your name? A. Jesus Ruiz.
Q. Where do you live, Mr. Ruiz?
A. Tijuana.
Q. What is your business or profession?
A. I am a lawyer.
Q. Are you admitted to practice in Mexico?
A. Yes. I have a title which was given to me in May of 1910.
Q. Of what school are you a graduate?
A. School of Law of the State of Chiapas, and also Free School of Law of Mexico City.
Q. Have you held any official positions?
A. Yes.
Q. What?

(Testimony of Jesus Ruiz.)

A. In my state after I was admitted to practice, I served as attorney general of justice of the state.

Q. Of what state? A. Chiapas.

Q. What courts are you admitted to practice in?

A. In all of the courts of the Republic of Mexico.

Q. Will you tell the Deputy Commissioner what laws were in effect governing the marriage ceremony in Mexico in 1926, and I refer particularly to those laws which governed marriages at Tijuana, Lower California?

Mr. Pillsbury: I don't wish to try the question of the validity of the purported marriage. Any proceeding in the nature of annulment of a purported or voidable marriage should be brought in the proper court, and not before me. The question is open in this proceeding as to whether there was any marriage at all, but not the question of whether a purported marriage may or may not have been valid and in compliance with all formalities.

Mr. Roberts: The Defendant Fireman's Fund Insurance Company and Freeman Steamship Company certainly want to put in the record with reference to whether or not the Mexican laws relating to marriage were complied with, because if those laws were not complied with, it is the contention of the defendant that this widow will not be entitled to compensation benefits.

Mr. Pillsbury: If it is the contention that it is a voidable marriage, then that matter should go to some proper court for determination.

(Testimony of Jesus Ruiz.)

Mr. Roberts: It may not only be voidable, but it may be void ab initio, and that is why I want to get this testimony in.

Mr. Pillsbury: Will you tell a little more fully just [139] what you propose to show by this witness?

Mr. Roberts: I will try to prove by this witness that the laws in effect in August of 1926, as evidenced by the Civil Code, require that each party fill out and file an application, that they were required to give certain information about themselves, that they were required to be married by a Judge of the Civil Registrar, that it was necessary in order to perform a valid marriage in Tijuana at that time that both parties must have present a witness who had known them for a period of three years, and that at the time the application is made and at the time the marriage ceremony is performed the Judge of the Civil Registrar make a minute entry in the book for recording marriages at Tijuana, and that if those requirements were not complied with, the marriage never was performed.

Mr. Liggett: I would object to that offer of proof because the main question in the case is as to whether those things did or did not happen, and this witness, as I see it, cannot offer us any testimony on that unless he has made a search of the records. If his testimony is to be theoretical as an expert, I don't see how it can throw any light as to whether the many things which counsel has enumerated here has or has not been done in Tijuana.

(Testimony of Jesus Ruiz.)

Mr. Roberts: The woman's testimony is very clear about what she did not do, especially with respect to the kind of witnesses. [140]

Mr. Pillsbury: If it is shown to be a fact that the claimant and Mr. Olcott did go to some Mexican office to a place wherein people were getting married and did go through some form of marriage and that she was given a certificate of marriage, then I would not assume jurisdiction here to determine whether those formalities sufficiently complied with Mexican law. That question is one which should come up, if at all, in proceedings to annul a marriage, and which is a matter for the courts. In so far as there may be a contention, if there is one, that she did not go to Tijuana, did not go to any person, that there was no effort to have the marriage made, that question would be open and you could offer evidence on that.

Q. (By Mr. Roberts): Mr. Ruiz, are there records kept in Tijuana of the marriages performed during the year 1926? A. Yes.

Q. Where are those records kept?

A. In the office of the Judge of the Civil Registrar. There are two places where they are kept. One is in Tijuana, and the other is in Mexicali, in case one should be destroyed.

Q. Have any of the records maintained in Tijuana ever been destroyed since 1925?

A. No, I have been there all those years myself.

Q. Did you at anybody's request make an examination of the books kept at the office of the

(Testimony of Jesus Ruiz.)

Civil Registrar for [141] the purpose of determining whether or not there was a record of the purported marriage between Walter Olcott, deceased, and Cora Oleott or Cora Hartshorn during the year 1926?

A. I don't remember the names. On entering the court room here I saw this lady here and remembered her as one who had asked me to look up some records for her.

Mr. Pillsbury: Mrs. Olcott, could you by any chance have used your maiden name at the time of the marriage?

The Claimant: I took my maiden name.

Mr. Pillsbury: What is your maiden name?

The Claimant: Kinzer.

Mr. Pillsbury: Did you use that name at Tijuana?

The Claimant: Yes, I did use my own name. I did not use my former husband's name.

Q. (By Mr. Roberts): Did Mrs. Olcott give you her name and the name of her husband, or what names did she give you?

A. She gave me two names, but I don't remember them because they are in English. I personally went to look for them, because I saw she was very much interested and I personally went through the books and I could not find the marriage record.

Q. Over what period of time or during what years was the search made?

A. All of the year of 1926, the whole year.

Q. How did you make your search? [142]

A. Page by page, entry by entry.

(Testimony of Jesus Ruiz.)

Q. (By Mr. Pillsbury): What names did you look up? What names did you search for?

A. I don't remember. It is impossible for me to remember it. The only thing I can remember is having seen the lady here in the room. I also made more of a search. As I could not find it, before I left I suggested to the clerk in the office that he assist her in every way that he could in looking through some of the other years.

Mr. Roberts: May I be permitted to ask this witness who is legally authorized to perform marriage ceremonies in Tijuana?

Mr. Pillsbury: Yes, or was at that time.

A. In that year, since 1917 up until 1932, the laws in effect were the laws of domestic relations, and in accordance with that law there was, as there is now, one official of the Civil Registrar. He is the Judge of the Civil Register, and that official is the one who performs all marriage ceremonies.

Q. Mr. Ruiz, what were the requirements of Mexican law with reference to filing of an application for a marriage in Tijuana at that time?

A. May I get the Code?

Mr. Pillsbury: Just state what it is.

A. There must be filed a petition to the official of the Civil Registry, a written application, and that application must be signed by the man and by the woman who wish to marry. It must also be signed by the father and mother of both contracting parties in case they are alive, and by two witnesses for both parties, who have known them for three

(Testimony of Jesus Ruiz.)

years before the marriage. In that condition it should be expressed the name of the bride and the groom. The names of the father and mother of each one of them should also be stated, where they lived, what was the occupation, their age, and the oath of their being no impediment to the marriage. The question of residence was taken very much into consideration, because only those could marry whose domicile was that of the official registrar. That is all.

Q. (By Mr. Pillsbury): May I ask, was there only one person in Tijuana in 1926 who could solemnize a marriage?

A. Yes. There is only one in each population in accordance with the law, and there was only one in Tijuana at that time.

Q. Could a judge of the civil court perform a marriage ceremony? A. No.

Q. Or the mayor of the town or any other public officer?

A. No; only in some towns where there is no judge of the civil register and where there is a mayor. In places [144] where there is an official of the civil register, nobody else can perform the ceremony.

Q. Cannot a priest or minister of the gospel perform a marriage, or could he at that time in Lower California?

A. No, sir. Since 1884 up to date priests cannot marry any individuals unless they are married first by the civil registrar.

(Testimony of Jesus Ruiz.)

Q. There was such a thing as a religious marriage, was there not?

A. No, that is prohibited. It must first be a civil marriage, and priests cannot marry two persons unless they bring a certificate of marriage of the civil registry. If such minister or priest married a couple without such certificate, he would be violating the law.

Q. There was a judge of the civil registry in Tijuana in 1926, August of 1926?

A. I am sure there was.

Q. Are there applications recorded?

A. Yes, they are recorded, because the procedure is as follows: the petition is filed; the judge calls on each of the persons who have signed an application, one at a time, in order that they may say whether or not that which is written is true. When the applications are presented to the judge, he calls them all in to ratify it. Then after ratifying the application he fixes a time within eight days, and then when they are all present again he asks those who are to be married if they ratify their applications still, and if they still wish to be married, he then declares them to be married in the name of the law and in the name of society, and all that procedure is thereupon recorded in a book. There is a record made, written in a special book and in that book the married persons sign and the witnesses sign and all those who were present sign. The book is called the Book of Registry of Marriages, and that is kept in such manner.

(Testimony of Jesus Ruiz.)

Q. When was Mrs. Olcott at the office of the Civil Registry?

A. About three or four months ago, more or less, as I recollect. I don't remember exactly.

Q. What conversation did Mrs. Olcott have with you at that time?

A. She said it was very necessary that she prove she was married to a man who had suffered an accident; that she had lived with him during all of her life, and that it was necessary she have what she would be entitled to in order to live. For that reason I was interested, and I personally went through the books. I felt sorry for the lady, and I personally went to the office of the Civil Registry. After looking through the record there I was convinced that there was no record of her marriage.

Q. (By Mr. Roberts): In your opinion, if the requirements of law were [146] not complied with, as you have outlined them here, would there have been a legal marriage?

Mr. Liggett: Objected to as calling for an opinion and conclusion of the witness, and also irrelevant, incompetent and immaterial.

Mr. Pillsbury: Sustained. I will receive evidence as I said, but on the question of whether or not any attempted or purported marriage was in fact made, but not on the validity of any purported marriage.

Mr. Roberts: I don't follow your reasoning. May I have it a little more explicitly?

(Testimony of Jesus Ruiz.)

Mr. Pillsbury: You may offer any evidence you wish to whether Mr. and Mrs. Olcott did go to Tijuana or not, to officials there, for the purpose of getting married. And if it should appear that it is apparent that there was some marriage ceremony actually performed and a certificate given the parties, the question of whether that complies in all respects with the Mexican law, or its legal effect, is to be determined in the courts rather than by me. In other words, it would be in the nature of a suit to annul or set aside an invalid marriage, which is a judicial matter.

Q. (By Mr. Roberts): Do you have any knowledge of your own as to the accuracy and the completeness of the records of marriages in Tijuana during 1926?

Mr. Liggett: I object to that as calling for an opinion [147] and conclusion of the witness, and no proper foundation laid.

Mr. Pillsbury: Objection overruled.

A. The marriages legally held are properly registered or recorded, and in those records is shown the truth of what was done.

Q. (By Mr. Pillsbury): Are there any other records of marriages there, not of legal marriages, that you had in mind?

A. No. But when I referred to marriages legally held, I meant that there are many ceremonies which are not legal and proper. But at that time, in 1926, there were not so many of those fake marriages.

(Testimony of Jesus Ruiz.) .

Q. Who are these people who have been performing marriages not legally right?

A. I don't know exactly. I would like to know them. There are many offices which say, "Law Office," all along the whole street. That is where it is done.

Q. Do they perform marriage ceremonies in those offices you have mentioned?

A. I know of one instance where I was working in the office of the Judge of First Instance that false marriage certificates and false divorce decrees were presented, some made in Ensenada and some in Tecate, and there wasn't any such marriage or such divorce.

Q. Tell me, what were the written residence requirements for a valid marriage in Tijuana in 1926? [148]

A. They have always been, according to the Civil Code, six months of actual residence and doing business.

Q. By both parties? A. For both.

Q. Then, an American cannot legally cross the border and be married in Mexico? Is that correct?

A. No.

Q. For an American couple to go across the border and get married and come back, that is not a legal marriage?

A. They did not get married in Tijuana.

Q. Did they in 1926?

A. At that time the Governor of the State could waive that requirement of residence, but inasmuch

(Testimony of Jesus Ruiz.)

as there had been many abuses of that privilege, since that time it has not been granted.

Q. Isn't it a fact that many people from the United States have gone across the border and had some form of marriage ceremony performed and came back with a certificate?

A. They went over there, and the man and woman executed a power of attorney for others to represent them and be married for them in the State of Chihuahua where there is a special law, the law of marriages by proxy.

Q. How about people, men and women, going to Tijuana and going through some form of ceremony before some officer and being given a marriage certificate and told they are married and come back again, isn't that done to a [149] considerable extent?

A. What happens is this: I wish to admit the sin of my own town, and it is time that it was corrected. A couple does go to Tijuana to get married. They sign a power of attorney, and that power of attorney is sent to the State of Chihuahua so that they can be married by an attorney-in-fact over there. However, the man in Tijuana who does this work is not an employee of the government nor does he represent the law. I, personally, have not seen this actually done, but it is the common talk, and I have heard evidence to the effect that they go through a ceremony in Tijuana in much the same manner as a valid marriage, "Do you accept this woman as your wife?" and, "Do you accept this

(Testimony of Jesus Ruiz.)

man as your husband?" and that they declare them married, the couple would not want to pay the \$25.00, or whatever the fee is. But there is no actual marriage performed. The marriage is not performed until the power of attorney reaches the city or town in the State of Chihuahua, when the marriage is performed there by proxy, and the certificate of marriage returned from Chihuahua to the couple.

Q. The certificate, then, is not given to the parties at the time of the ceremony in Tijuana?

A. No, not at the time of the ceremony. Afterwards the certificate is sent by mail, and that is the certificate which is legal. [150]

Q. Has that been done occasionally in past years?

A. They did not do it in 1926, because, as I stated before, there was no necessity for this, because Americans could come across the line and the Judge of the Civil Registry was permitted to marry them by a special dispensation of the Governor of the State.

Q. Do all of those marriages necessarily appear in the registry of civil status?

A. Yes. Which do you mean?

Q. All of the cases of Americans going across the border in 1926 and becoming married?

A. Yes, all of them. This is necessary, because in Mexico you cannot prove the status of the persons without registration or a record.

Q. In a case that I have had before me some years ago that Mr. Roberts is acquainted with, of Mrs. Cowie, the evidence showed that about nine-

(Testimony of Jesus Ruiz.)

teen hundreded—I have forgotten the date—she and Mr. Cowie went across the border at Tijuana, went through some form of marriage that same day and came back and she presented a paper purporting to be a marriage certificate in Spanish by some officer in Tijuana. I don't know whether that was verified by checking the files but how would you account for that sort of situation?

Mr. Roberts: I would like to object to the question upon the grounds that it is incompetent, irrelevant, immaterial, and the answer would not tend to prove or disprove [151] any issues in this case.

Mr. Pillsbury: Objection overruled.

A. The following might be done: Often people come to my office and say, "We are married, and here is our certificate." What they present is not a marriage certificate, but a sort of notice given by the official who performed the ceremony, in which it state, "Mr. So-and-so and Mrs. So-and-so were married on such-and-such a date, and the record of the marriage is in the book so-and-so and on page so-and-so." That is the date which they have so that when they wish a copy of the certificate of marriage they can receive it by paying the cost of \$7.00. There are, however, some instances in which persons who are married in Tijuana are very much interested in getting a copy of the marriage certificate at once, and in that case they pay a special fee to the clerk, who will remain at his desk and not go out to eat and will stay there and make it up for him. That is all. If I had to take my daughter, for instance, to

(Testimony of Jesus Ruiz.)

get married and I had urgent need for a copy of the decree of marriage now, I would pay \$25.00 or \$30.00 extra, and they would give me a copy the same day.

Q. In the case you have just mentioned of the people going to somebody, some official, and receiving such a paper, will there necessarily be a record of that in the register of civil status?

A. You mean in the case of the man or wife coming in [152] to me and handing me that notice?

Q. Yes.

A. The notice is always true, correct, and it serves the purpose of permitting the groom and bride to go to a church and be married religiously.

Q. Will the registrar of the civil status you mentioned in that case have a record of that marriage? A. Yes, it is all there.

Q. What I am trying to find out is, Is there some way of an American going across the line to Tijuana and going through what they believe to be a marriage ceremony and getting something which looks like a certificate and yet there not being a valid marriage recorded on the register of civil status?

A. No, that was not the practice in 1926. At that time there were no proxy marriages; they were married legally; there was no necessity for them to commit that crime.

Q. Is it a practice now?

A. That is the general topic of conversation in the streets of Tijuana, but personally I have no

(Testimony of Jesus Ruiz.)

knowledge of it. If I knew exactly who it was who was doing it, I would already have gotten him into jail.

Q. If Americans go across the border into Tijuana now and go through a marriage ceremony and come back with a certificate and do not have three months residence in [153] Mexico, or any residence in Mexico, how would you explain that situation?

A. Possibly they obtained a dispensation of the Governor. It is covered by dispensation, much as when minors are married.

Mr. Pillsbury: Mr. Roberts?

Mr. Roberts: I have no further questions.

Mr. Pillsbury: Mr. Liggett?

Cross-Examination

By Mr. Liggett:

Q. Mr. Ruiz, did you ever search the records over in Mexicali regarding this particular marriage between the Olcotts?

A. No. I saw the originals, which are in Tijuana. The copies which are in Mexicali, I did not see.

A. When you speak of originals, they are both originals, are they not?

A. Yes, they both are valid.

Q. It is a fact, is it not, that all of these records are written in longhand and not in typewriting of any kind?

A. There are some in print. When there are many applications in a day, the applications are filled

(Testimony of Jesus Ruiz.)

in on a printed form, but the record is always written by hand. The applications are forms to be filled out, but the record is always in handwriting. [154]

Q. It is also true, is it not, that many of the marriage records at Tijuana have no index pertaining to them?

A. Yes, they all have indices, almost all of them. There are some very old books which have no indices, but that is before 1919 when they began there.

Q. Is it not also true that during the year 1926, or a part of the year 1926 and all of the years 1927 and 1928 that there are no indices at all?

A. I think they exist. I have an idea that they do. I could not be sure that there were not.

Q. Isn't it also true that many of the records are written in handwriting that is almost illegible, almost impossible to read?

A. All are written by hand, but you can read them, well, by paying close attention. Some are indistinct and some are fair, but they can be read.

Q. Is it also true that approximately seventy-five per cent, that is to say, three-quarters of all the marriages in the book for the year 1926 are between couples or people having American names rather than Mexican or Spanish names?

A. Yes, there were lots of marriages at that time.

Q. And nearly all of those people were people who came over to Mexico from the United States?

A. Yes.

Q. And they came over there to be married and returned again to the United States immediately after the ceremony?

(Testimony of Jesus Ruiz.)

A. I don't know whether they returned immediately, but I do know that many of them came over to be married.

Q. And it is also true that at that time the matter of procuring both divorces and marriages by proxies through powers of attorney were also prevalent there, is it not?

A. At that time there were no divorces or marriages by proxies. Now there are, yes, in Chihuahua.

Q. There were then in Chihuahua, weren't there? A. No.

Q. When did the law in Chihuahua come in effect? A. Which law?

Q. The one with reference to marriages and divorces?

A. Divorces about eight years ago, more or less, and marriages about a year and a half or two years ago.

Q. It is also true, is it not, Mr. Ruiz, that certain marriage records are kept in Mexico City, referring to marriages performed in Lower California?

A. No, and for this reason: all of the registrations are kept at the capitols of the states or territories. Up to the year 1919 the records for Tijuana were kept in Ensenada. From 1919 up to this date they have been registered in Tijuana and one copy sent to Mexicali. Never have copies been sent to Mexico City. [156]

Q. (By Mr. Pillsbury): Mexicali is the capitol of the state?

(Testimony of Jesus Ruiz.)

A. Mexicali is the capitol of the Northern District of the Territory of Lower California, now.

Mr. Liggett: I think that is all.

Q. (By Mr. Pillsbury): Let me ask you again, did you find the record for 1926 well and carefully kept and comparatively complete, or incomplete?

A. Yes, they are in order and well kept.

Q. Is there any likelihood, in the case of Americans going across the border to be married in Tijuana in 1926 or later, that the ceremony would be performed and the papers would be filled out and that for any reason they would then not be recorded?

A. That is, that the marriage was not performed?

Q. No. The marriage was performed, but the papers not recorded, for any reason?

A. No, because they have to sign the record. The record of the procedure is written in longhand in a bound book, the pages of which are numbered on both sides, and you cannot extract the leaves from the book, and at the conclusion of the ceremony the book must be signed at the foot of the written procedure.

Q. Does it require a separate fee to have the papers recorded after the marriage is performed?

A. They have to pay the fees to the court or to the judge, and a fee to the state.

Q. And is there another fee for recording after that?

A. There is no recording fee. It is right in the bound book. The marriage record is right in the book.

(Testimony of Jesus Ruiz.)

Q. At the time of the solemnizing of the marriage?

A. Yes. That is, the performing of the ceremony, the solemnizing of the marriage, is all entered in the book and the signing of the book. That is what we call the solemnizing of the marriage. Without that record being signed there is no marriage.

Q. I am not speaking of the validity of what they do. Here when the ceremony is performed the papers are signed by the person performing the ceremony and they are then sent over to the county clerk's office to be recorded. Is there any practice like that in Tijuana for marriages?

A. No. The judge who marries anyone in Tijuana has his book and writes it in the book.

Q. At the time?

A. At the time of performing the marriage.

Mr. Pillsbury: Any other questions of this witness?

Q. (By Mr. Grogan): Mr. Ruiz, at the time of Mrs. Olcott—the lady sitting here at the counsel table—at the time Mrs. Olcott came and met you at the marriage registry three or four months ago, as you have testified, did she tell you her name [158] and the name of her deceased husband?

A. She told me the name of the two for whom I searched the record. That is necessary, because in the margin of the record the names of the married parties appear.

Mr. Grogan: That is all.

(Testimony of Jesus Ruiz.)

Q. (By Mr. Pillsbury): You don't remember what names she gave you?

A. No, I don't. I just recognized the lady as I came in.

Mr. Grogan: Let the record show that.

Mr. Liggett: Mrs. Olcott, do you remember the conversation with Mr. Ruiz that he is mentioning?

The Claimant: Yes; more than has been spoken of.

Mr. Pillsbury: Anything else of Mr. Ruiz?

Q. (By Mr. Liggett): When you looked up the index or the document for Mrs. Olcott, how did you have her name spelled in your mind? How did she tell you her name was spelled, and what letter did you look under?

A. She wrote on a small piece of paper the name of the man and her name, and I took the paper. She said, "Here are the names." I then went away and looked for the record.

Q. And were those the only names, the spellings of those names, that you looked under, that she gave you? A. Yes, no more than that. [159]

Q. She gave you the name of Olcott, didn't she?

A. I don't remember. It is impossible for me to remember.

Q. Did you look under any other possible spellings of that name, such as Holcott, spelled with an "H," or Wolcott, spelled with a "W," or Alcott, spelled with an "A"?

(Testimony of Jesus Ruiz.)

Mr. Roberts: I object to the question. He just said he does not know. He took a piece of paper on which the names were written.

Mr. Pillsbury: Objection overruled.

A. Yes, I looked under similar names, as well as the names which she gave me, at the office of the civil registrar, and the clerk there joined with me and we looked together.

Q. Did you look beyond the year 1926, either before or after?

A. Two years before, and the year 1926, and two years after, five years altogether we looked. I also asked the lady if she remembered in what building she had been married, and if it was on the lower floor or upstairs. She could not explain to me how she got married.

Mr. Liggett: That is all.

Mr. Roberts: That is all.

Mr. Liggett: The only evidence that I have to present at this time would be the testimony of one or two other people who have known the Olcotts for several years past and [160] have known that they have lived together and conducted and deported themselves and represented themselves to be husband and wife. If that can be stipulated, that such has been the case, I won't put them on, but if it cannot be stipulated, I will have to put on my witnesses.

Mr. Pillsbury: Would it be stipulated that such witnesses, if called, would testify to that effect?

Mr. Roberts: Yes, I think we could stipulate to that. What I want to know now is, do you propose to put Mrs. Olcott on the stand to testify to any conversation she had with Mr. Ruiz at Tijuana? The only reason I ask that is that I will let him go now if you do not expect to do that.

Mr. Pillsbury: I think we should inquire a little further on that. Mrs. Olcott, will you take the stand?

CORA E. OLCOTT

recalled, testified as follows:

By Mr. Pillsbury:

Q. Mrs. Olcott, I believe you indicated a moment ago you recall talking with this gentleman, Mr. Ruiz, who has just testified. A. Yes.

Q. Did you give him the names to look up in the marriage book and records? A. Yes.

Q. What names did you give him? [161]

A. I gave him my maiden name and Mr. Olcott's.

Q. Is there anything else you want to state about that conversation?

A. He said he could not understand Mr. Liggett or the lawyers here. He said cases of that kind—

Q. You are speaking of Mr. Ruiz now?

A. Yes. Cases of that kind they had to prove that if they lived together for a number of years, that it was settled—

Q. Anything else?

A. That was all of importance, that they didn't have to—that they were man and wife.

Mr. Pillsbury: One more question from Mr. Ruiz.

JESUS RUIZ

recalled, testified as follows:

By Mr. Pillsbury:

Q. Mr. Ruiz, was there any such thing as a common law marriage in Mexico in 1926?

A. In 1926, no. That was the decision of 1917; prior to 1917 there was such a law. Eight years, it was.

Mr. Pillsbury: Anything else?

Mr. Roberts: That is all I have. I think it would be feasible, if it is possible to arrange it, to have a hearing at Tijuana so that we could take the testimony of the clerk or the judge of the civil register, to give the deputy [162] commissioner an opportunity to personally examine the record. I don't know whether that can be arranged or not. Do you think so, Mr. Ruiz?

Mr. Ruiz: Anybody can go there.

Mr. Roberts: Could we get the testimony of the clerk of the civil register? Would he give testimony?

Mr. Ruiz: The book itself. You have a certificate from the judge.

Mr. Roberts: What I want to know is, if we went to Tijuana, could we take his testimony there.

Mr. Ruiz: Yes. He can also come here. I can assure you of that.

Mr. Pillsbury: Mr. Liggett is given one month in which to have a search made, personally or otherwise, of the marriage records at Tijuana or Mexicali, or both, and let me know whether he desires fur-

(Testimony of Jesus Ruiz.)

ther proceedings. At the expiration of that period, if I don't hear from him, I will take under consideration Mr. Roberts' request for an opportunity to strengthen his evidence by a deposition or hearing, if possible, under stipulation or otherwise, at Tijuana, and review the records if it appears necessary at that time. [163]

State of California,
County of San Diego—ss.

I, Charles C. Otis, a duly qualified shorthand reporter, certify: That the foregoing is a full, true, and correct transcript of the proceedings had and testimony adduced at the hearing held before said Deputy Commissioner in the Jury Room of the Municipal Court, County Court House, City of San Diego, County of San Diego, State of California, on the 23rd day of May, 1945, between the hours of eleven o'clock a.m. and one o'clock p.m. of said day.

In Witness Whereof, I have hereunto set my hand at my office in the City of San Diego, County of San Diego, State of California, on this 11th day of June, 1945.

/s/ CHARLES C. OTIS,
Shorthand Reporter. [164]

Received June 14, 1945. District No. 13.

Copy forwarded to Washington. [165]

October 3, 1945

Walter Olcott, 1017-42

Consulate of Mexico
San Francisco, California
Attention: Senor Ballesteros
Legal Advisor

Dear Senor Ballesteros:

I am taking advantage of your offer to make some further inquiry for this office through Mexican government sources with reference to the contention of a valid Mexican marriage at Tijuana. You will recall discussing this matter with me in the presence of Mr. E. R. Kay one of the attorneys for the defendants, recently.

The general problem is that the right of Mrs. Olcott to a death benefit for the fatal injury sustained by her husband at San Diego on November 6, 1944 depends upon the establishment of her claim that she was married to Mr. Olcott at Tijuana, Mexico on August 26, 1926. She testified that they were married at a place where several couples were gathered for the purpose of being married and where marriage ceremonies were being performed. At other times she states she was under the impression that her marriage was performed by a "preacher." She says a former marriage certificate, in Spanish, was given them, which has since been lost, and that there were two witnesses to the marriage, Mexican nationals, who were old friends or acquaintances of her husband. There being no evidence impugning her credibility, I am accepting her statement as true

as far as it goes. She lived with Mr. Olcott continuously from the day of the asserted marriage until the date of his death on November 6, 1944, the parties holding themselves out to the community as to be husband and wife.

On the other hand a gentlemen named Jesus Ruiz, a lawyer of Tijuana, testified that he has had a check made through the official records of marriages at Tijuana and no record appears of the marriage of these parties.

Duplicates are kept at Nogales but apparently no search has been made there. If the marriages were validly performed, it would be shown on such records with one exception, that so-called proxy marriages under power of attorney are permitted by Mexican law in which the actual record would be at Chiahuahua or in some other State of the Republic of Mexico. However, he testified that such proxy marriages were not being performed and were not valid in the year 1926 or before approximately two years ago.

[Notation]: Copy mailed Mr. F. W. Crawford,
Atty., Kohl Bldg., S. F., 11-5-45. EB. [166]

Several questions arise upon which I would appreciate any help that can be obtained from an impartial and authoritative source such as yourself or the Consulate to assist in determining as follows:

- (1) Are the records of marriages at Tijuana for a period including the year 1926 carefully, completely and accurately kept.

- (2) Upon the information stated above, is it possible or impossible that Mr. and Mrs. Olcott may have been validly married at Tijuana, notwithstanding the absence of an official record as testified to.
- (3) If you should happen to be in Tijuana in the near future as you indicate, would you be able to look through the records for that year and see what you can discover.
- (4) Is it possible, notwithstanding the absence of such record that Mr. and Mrs. Olcott may have been colorably married at Tijuana, i.e., that they might have appeared before some person who might by argument be supposed to have some authority even though such authority does not now appear with complete validity.
- (5) How can one reconcile the so relatively large number of Americans going across the Border to Mexican towns such as Tijuana and returning with purported marriage certificates and believing themselves to be married, on the one hand, with an indicated much smaller number of cases in which records of such marriages are found in the legal register of marriages.

It seems to be a matter of common knowledge that more American couples go through some form of ceremony across the Border, are given some form of certificate and return in the belief that a marriage has been performed, than Mexican law as to resi-

dence requirements, etc. would permit to be married with entries in the register of marriages performed by proper authority.

Thanking you for any help you can give me in determining the real facts and probabilities of the case, I remain

Yours very truly,

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

P.S. If a search should be made of the records, the information I have is that it [167] it was asserted to have been performed on August 26, 1926. Name of the husband was Walter Olcott. Mrs. Olcott states she was married under her maiden name of Cora Kinzer Hartshorn and search might be made under the name of Cora Hartshorn.

WHP

WHP:s

CC to Mr. E. R. Kay, Attorney at Law, 233 Sansome Street, San Francisco, California; Mr. Murray H. Roberts, Attorney at Law, Citizens Bank Building, Wilmington, California; Mr. Ruel Liggett, Attorney at Law, 502 U. S. National Bank Building, San Diego 1, California. [168]

Mario Ballesteros, "Edificio Lelevier," Ensenada,
Baja California, Mexico

November 9, 1945

United States Employee's Compensation
Commission

Thirteenth Compensation District

417 Market Street, Room 318

San Francisco, California

Attention: Mr. Warren H. Pillsbury

Deputy Commissioner

File: Walter Olcott, 1017-42

Gentlemen:

1. I have thoroughly checked the records of marriages at the Civil Register Office at Tijuana, Lower California, Mexico, and I have found that said marriages for a period of 31 years, including the year 1926, are carefully, completely, and accurately kept, as well as legally maintained.

2. and 3. When I examined said records as stated above, I found that there was no records of marriage of Mr. and Mrs. Walter Olcott on August 26, 1926, or for any time during the year of 1926.

4. According to article 46 of the Civil Code then in effect, which is worded as follows: "The civil status of persons can only be proved by the respective entries in the register. No other document nor method of proof is admissible to prove the civil status, except in the cases provided for by articles 45 and 358." (Art. 45: "When no registers have

existed, or they have been lost or destroyed, or effaced, or some of the leaves are missing on which it might be supposed the records was made, proof of the fact or act by means of instruments or witnesses may be received; but if one of the registers has been rendered useless and the duplicate exists, the proof shall be taken from the latter, without admitting any other class of proof." And art. 358: "In the cases of abduction or violation, when the time of the offense coincides with the conception, the tribunals may, at the instance of the interested parties, declare the paternity."); from the information stated above, it is impossible that Mr. and Mrs. Olcott were validly married at Tijuana. The Civil Register Offices have been in existence in Tijuana and instituted since 1914, and in this particular case, the records having not destroyed or effaced, and since none of the leaves are missing on which it might be supposed the record was made, and since therefore, no proof of the fact or act by means of instruments or witnesses may be received; and there being a duplicate book of the register which does not contain any record of such a marriage, it is impossible that Mr. and Mrs. Olcott could have been legally or colorably married in Tijuana. They might have appeared before some person, but without any authority to perform marriages.

5. The number of purported marriages by American citizens in Tijuana is not as large as commonly believed. The purported marriages which are supposed to have been performed in Tijuana, of which

records no exists, are, without doubt, done by the parties for their own convenience or for other illegal purposes. [169]

Also, when I examined said records as stated above, I found that there was no records of marriage under Mrs. Olcott's maiden name of Cora Kinzer Hartshorn on August 26, 1926, or for any time during the year of 1926.

Wishing that this information will be complete as requested, I remain

Yours very truly,

/s/ MARIO BALLESTEROS. [170]

November 16, 1945

Pinecone's Food Insurance Co.
Mr. Murray H. Roberts, Atty.
Citizens Park Ridge,
Wilmington, Calif.

Walter Givett, 1017-42
Blosser, Bailey, Gray & Givett,

Pacific Refrigerator Inc. Co.
1053 South Hope Street
Los Angeles, California

Lippett & Lippett, Atty. at Law
502 U.S. National Bank Bldg.,
San Diego, California

Pinecone's Food Insurance Co.
Attn. Mr. H.R. Hay
233 Sansome Street
San Francisco, California

Continuing:

Some time ago I had occasion to mention the Givett to Mr. Mario Bellastrosa who was at the time attorney for the Mexican Consulate at San Francisco. He engaged to make some investigations for me of the alleged Mexican marriage of Mrs. Givett, and today I received his letter of November 9, 1945 and enclosed copies to all parties. I am informed that Mr. Bellastrosa has now left the service of the Mexican Government. He is apparently located at Mexicali. Unless objection be received, his report may be added to the record and considered as in evidence.

Yours very truly,

MURRAY H. PILLINGER
Deputy Commissioner
10th Corporation District

cc to Mrs. Givett, 1017-42, Los Angeles, California
Pinecone's Food Insurance Co., 1053 Park Ridge, Los Angeles, Calif.
Brown Lumber Co., P.O. Box 2130 San Diego, California.

December 5, 1945.

Walter Olcott, Deceased.
(Cora E. Olcott), Widow.
File 1017-42
Injured 11-6-44.

Senor Mario Ballesteros,
"Edificio Lelevier,"
Ensenada, Baya California
Mexico.

Dear Senor Ballesteros:

Please accept my hearty thanks for your letter of November 9, 1945, giving information as to the status of marriages at Tijuana and particularly the contents of the official records with reference to an alleged marriage of Walter Olcott.

There is one other question in the case upon which, if you could inform me without putting yourself to further effort, it would be much appreciated. This is with reference to "proxy" marriages. There is some testimony in the record that such marriages were valid according to the law of the State of Chihuahua, without the parties going to that State for the purpose of having a marriage performed but that the law of Chihuahua did not authorize such proxy marriages until some time later than the Year 1926. The question is, therefore, whether such "proxy" marriages were valid and recognized in any of the states in Mexico at any period of time which would include August 26, 1926. It would not be necessary to know how many of such states per-

mitted proxy marriages at that time if there were several, but only the names of one or more of such states, if any.

Wishing you success in your new work, I remain,

Yours very truly,

WARREN H. PILLSBURY,
Deputy Commissioner,
Thirteenth District.

WHP:eb [172]

December 14, 1945.

Re: Walter Olcott (Deceased) 1017-42
Cora E. Olcott, Widow.
Inj. 11-6-44.

United States Embassy,
Mexico, D. F.,
Mexico.

Attention: Legal Department

Gentlemen:

I have before me for decision under the Longshoremen's and Harbor Workers' Compensation Act, the above case in which decision depends upon the validity of a purported Mexican marriage alleged to have been contracted at Tijuana between American citizens. One legal matter remains incomplete in my files and I am writing to ask whether you can supply me with any legal information upon the question.

The situation presented is that the claimant, Mrs. Cora Olcott, has testified that she went through

some form of marriage ceremony at Tijuana with the deceased employee, Walter Olcott, on August 26, 1926. No record can be found in the official records at Tijuana of such marriage. However, there is some evidence in the record concerning so-called "proxy" marriages which could be performed through the laws of other states of the Mexican Republic without the parties going to such state for the solemnization of the marriage. There is evidence that the law of Chihuahua permits such "proxy" marriages but that such law did not take effect until several years after 1926. As there might be some possibility that the alleged Olcott marriage could have been a "proxy" marriage at Tijuana, the question upon which I would appreciate some help is whether such "proxy" marriages were permitted under the laws of any state of the Republic of Mexico for a period which would include August 26, 1926.

Thanking you for any help you can give me, I remain,

Yours very truly,

WARREN H. PILLSBURY,
Deputy Commissioner,
13th District.

WHP:eb [173]

Number: [Illegible]. File: 73-48/571.2/34.

[In Pencil] 1017-42

San Francisco, California,
December 10, 1945.

Mr. Warren H. Pillsbury,
Deputy Commissioner,
U. S. Employees' Compensation Commission,
417 Market St., Room 318,
San Francisco 5, California.

Dear Mr. Pillsbury:

I regret very much to tell you that this Consulate is not in a position to furnish you the information requested in your letter of December 5, 1945, due to the fact that we do not have in our library the marriage laws of the different States in Mexico.

It is suggested, therefore, that you write the American Embassy in Mexico City, Mexico, whose legal department, I am sure, can provide you with the desired information.

Regretting our inability to be of assistance, I am,

Sincerely yours,

/s/ EDMUNDO GONZALES,

Consul of Mexico.

Copy of above sent the following named: Liggett & Liggett, Attorneys. 502 U. S. National Bank Bldg., San Diego, Calif.; Stephen J. Grogan, Attorney, 215 West 7th St., Los Angeles; Murray H. Roberts, Attorney, Citizens Bank Bldg., Wilmington; Mrs. Coya E. Olcott, 4501 71st St., La Mesa, Calif.; John H. Black, Atty., 233 Sansome St., S. F. 12-20-45-eb. [174]

Embassy of the United States of America

Mexico, January 17, 1946.

Mr. Warren H. Pillsbury, Deputy Commissioner,
United States Employees' Compensation
Commission,

13th Compensation District,
417 Market Street, Room 318,
San Francisco 5, California.

Sir:

Reference is made to your letter dated December 14, 1945, in which you inquire whether proxy marriages were permitted under the laws of any State of the Republic of Mexico in the year 1926.

While diplomatic and consular officers are prohibited by the Foreign Service Regulations from interpreting the laws of a foreign country, and therefore, the Embassy is unable to answer specifically the question of whether proxy marriages in general, or any one marriage in particular might have been valid in Mexico in the year of which you speak, it is the desire of this office to be of such assistance as may be proper to enable you to consult with a duly qualified attorney to obtain the information you seek. To this end, the Embassy quotes below in translation Article No. 157 of the Mexican Civil Code of the Federal District and Territory of Lower California, issued on March 31, 1884:

“Article 157. Marriages may be performed before the officials stipulated in the law, and with all the formalities therein required.”

The Mexican Law Governing Family Relations of April 9, 1917, amendatory of the above-mentioned Civil Code, both of which were in effect in 1926 for the Federal District and Territory of Lower California, also states:

“Article 3. On the day and hour designated for the performance of the marriage, there must be present before the Civil Judge, at the place the latter may have determined upon, the parties thereto, in person or through a special representative legitimately appointed, and in addition [175] two witnesses for each one of the parties themselves, to vouch for their identity, as well as the parents or guardians of the parties, if any, and if they should desire to attend the ceremony * * *”

It is impracticable at this time for the Embassy to determine which of the Mexican States, in addition to the Federal District and Territory of Lower California, were in 1926 subject to the provisions of the Civil Code above cited and which States had Civil Codes of their own. Should this information be required, it would be necessary for the Embassy to institute inquiries through official channels of the Mexican Government, a procedure entailing considerable delay to which you may not find it necessary to recur.

Very truly yours,

For the Ambassador:

/s/ M. L. STAFFORD,

American Consul General.

Copy to—Mrs. Cora E. Olcott, 4501 71st St., Le Mesa, Calif.; Liggett & Liggett, Attorneys at Law, 502 U. S. Ntl. Bnk Bldg., San Diego, Calif.; Murray H. Roberts, Atty., Cit. Bnk Bldg., Wilmington, Calif. 1-30-46-eb. [176]

[Letterhead Mario Ballesteros]

January 31, 1946.

United States Employees' Compensation
Commission,

Longshoremen's and Harbor Workers'
Compensation Act (13th District),
417 Market St., San Francisco, California.

Attention: Mr. Warren H. Pillsbury
Walter Olcott
File 1017-42
Injured 11-6-44

Gentlemen:

In response to your last letter, please be advised that, to the best of my knowledge, it is true that "proxy" marriages were valid according to the law of the State of Chihuahua, without the parties going to that State for the purpose of having a marriage performed, but that the law of the State of Chihuahua did not authorize such proxy marriages until some time later than the year 1926. It is true also that such "proxy" marriages were not governed by any law nor permitted by any State of Mexico to be valid and recognized prior and at August of 1926.

Hoping that this information will be enough to clear any point or doubt you have in mind,

I am, as always, very sincerely yours,

/s/ MARIO BALLESTEROS.

Copy of above sent: Mrs. Cora E. Olcott, 4501 Seventy-first Street, La Mesa, Calif.; Liggett & Liggett, Attorneys, 502 U. S. Ntl. Bnk Bldg., San Diego, Calif.; Mr. Murray H. Roberts, Attorney, Cit. Bank Bldg., Wilmington, Calif.
2/8/46-eb.

JC:MB [177]

United States Employees' Compensation
Commission, 13th Compensation District

[Title of Cause.]

COMPENSATION ORDER AWARD OF DEATH BENEFIT

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 6th day of November, 1944, Walter Olcott, husband of the claimant herein, was in the employ of the employer, Freeman Steamship Company, above named, at San Diego Harbor, in the State of California, in the 13th Compensation District, established under the provisions of the Long-

shoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company;

That on the said day the said employee, while performing service for said employer, Freeman Steamship Company, sustained personal injury occurring in the course of and arising out of his employment and resulting in his death on November 12, 1944, as follows: While lifting heavy timbers on said November 6, 1944, he strained his abdomen, sustaining as a result thereof a small inguinal hernia which became strangulated and was followed by peritonitis and death; [178]

That defendant, Benson Lumber Company, was not the employer of said employee at the time of his injury and is entitled to be dismissed herefrom with its insurance carrier, Pacific Employers Insurance Company;

That notice of injury was given within thirty days after the date of such injury, to the Deputy Commissioner and to the employer;

That medical treatment was not furnished by defendants and that defendants are by stipulation liable for the reasonable cost of such medical, surgical and hospital treatment, the amount thereof to be fixed by further proceedings if the parties are unable to agree thereon;

That the death of the employee was not due to his unreasonable refusal to submit to medical or surgical treatment;

That the average earnings of the employee herein at the time of his injury and death exceeded \$37.50 a week;

That Cora E. Olcott, claimant herein, born February 27, 1879, is the widow of the deceased employee, Walter Olcott, was married to him on August 26, 1926, and was living with him as his wife and dependent upon him for support at the time of his injury. That she is entitled to a death benefit at the rate of \$13.13 a week beginning with November 12, 1944, payable in installments each two weeks or monthly at her election until the further order of the Deputy Commissioner, subject to the limits as to duration of payments, etc., contained in said Act;

That the reasonable expense of burial of the employee was over \$200 and is owing to Benbough Funeral Parlor, San Diego, California;

That claimant's attorney, Ruell H. Liggett, has rendered legal service [179] to claimant in the prosecution of her claim for which a fee is approved in the sum of \$100.00 and lien granted therefor upon compensation benefits herein awarded.

Upon the foregoing facts, the Deputy Commissioner makes the following:

Award

That the employer, Freeman Steamship Company, and the insurance carrier, Fireman's Fund Insurance Company, shall pay to the claimant compensation benefits as follows:

(1) To claimant the sum of \$200.00 on the burial expense, payable direct to said undertaking firm, Benbough Funeral Parlors, San Diego;

(2) To claimant the sum of \$13.13 a week beginning with November 12, 1944, and payable in installments each two weeks or monthly at her election thereafter until the further order of the Deputy Commissioner, subject however to the payment therefrom of the sum of \$100.00 to her attorney, Ruel H. Liggett, upon his lien for attorney's fee.

The claim is rejected as to defendants Benson Lumber Company and Pacific Employers Insurance Company, for the reason that said Benson Lumber Company was not the employer of the said employee at the time of his injury.

Given under my hand at San Francisco, California, this 18th day of February, 1946.

WARREN H. PILLSBURY,
Deputy Commissioner, 13th
Compensation District.

WHP:eb:gl

[Endorsed]: Filed May 13, 1946. Edmund L. Smith, Clerk. [180]

In the District Court of the United States in and
for the Southern District of California, South-
ern Division

In Admiralty—No. 706

FREEMAN STEAMSHIP COMPANY and
FIREMEN'S FUND INSURANCE COM-
PANY,

Libelants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner, U. S. Employees' Compensation Com-
mission,

Respondent.

MOTION FOR SUMMARY JUDGMENT

Now comes the respondent, Warren H. Pillsbury, deputy commissioner, by his attorney, and moves this Honorable Court to enter, upon the pleadings and upon the record herein, summary judgment in favor of the defendant, dismissing the action and in support thereof, the defendant says:

- (1) That as shown by the pleadings and the record filed therein, the libelants do not state a cause of action or claim against this defendant upon which relief can be granted.
- (2) That as shown by the pleadings and the record therein, the findings of the deputy commissioner in the compensation order complained of are supported by evidence, and

under the law said findings are final and conclusive and not subject to judicial review. [181]

- (3) That as shown by the pleadings and the record filed therein, the compensation order complained of is in all respects in accordance with law.
- (4) That the pleadings show that there is no issue as to any material fact and the respondent is, as a matter of law, entitled to judgment dismissing the libel.

CHARLES H. CARR,
United States Attorney.

RONALD WALKER,

Assistant United States Attorney, Chief of Civil
Division

/s/ CLYDE C. DOWNING,
Assistant United States
Attorney.

Attorneys for Respondent Warren H. Pillsbury,
Deputy Commissioner.

[Endorsed]: Filed Aug. 13, 1946. [182]

[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This case arises upon a libel for judicial review of a compensation order filed on February 18, 1946, by Deputy Commissioner Pillsbury pursuant to the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; 33 U.S.C.A. sec. 901, et seq.).

Cora E. Olcott filed claim for compensation on account of the death of her husband, Walter Olcott, on November 12, 1944, which resulted from injuries he sustained on November 6, 1944, while employed as a stevedore by the Freeman Steamship Company at San Diego Harbor, California. The claim was contraverted by the employer and insurance carrier, the Firemen's Fund Insurance Company, and hearings were duly held by the deputy commissioner on March 7, 1945, and May 23, 1945. The transcripts of testimony taken at said hearings have been made part of the answer of Deputy Commissioner Pillsbury filed herein and should be read in connection therewith.

The libellants allege in substance that the compensation order filed on February 18, 1946, is not in accordance with law for the reason that there is no evidence sufficient to support the finding of [183] the deputy commissioner to the effect that Cora E. Olcott is the widow of the deceased within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.

The Facts

The deputy commissioner in the compensation order complained of found the facts with reference to the employee's fatal injuries and marital status to be in part as follows:

"That on the 6th day of November, 1944, Walter Olcott, husband of the claimant herein, was in the employ of the employer, Freeman Steamship Company, above named, at San Diego Harbor, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company;

"That on the said day the said employee, while performing service for said employer, Freeman Steamship Company, sustained personal injury occurring in the course of and arising out of his employment and resulting in his death on November 12, 1944, as follows: While lifting heavy timbers on said November 6, 1944, he strained his abdomen, sustaining as a result thereof a small inguinal hernia which became strangulated and was followed by peritonitis and death; * * *

"That Cora E. Olcott, claimant herein, born February 27, 1879, is the widow of the deceased employee, Walter Olcott, was married to him on August 26, 1926, and was living with him

as his wife and dependent upon him for support at the time of his injury. That she is entitled to a death benefit at the rate of \$13.13 a week beginning with November 12, 1944, payable in installments each two weeks or monthly at her election until the further order of the Deputy Commissioner, subject to the limits as to duration of payments, etc. contained in said Act; * * *”

Before discussing the evidence, which in our opinion supports the finding complained of, it may not be inappropriate to invite attention to the following well established principles of compensation law. [184]

The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family: *Baltimore & Philadelphia Steamship Co. v. Norton*, deputy commissioner, 284 U. S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris*, 61 App. D. C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America, Inc., et al. v. Cardillo*, deputy commissioner, 70 App. D. C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & O. R. Co.*, 71 F. (2d) 810 (C.C.A. 4, 1934), certiorari denied October 8, 1934, 293 U. S. 581.

In the absence of substantial evidence to the contrary the presumption is “That the claim comes within the provisions of this Act”; section 20(a) of the Longshoremen's Act.

The burden is on the plaintiff to show that there was no evidence before the deputy commissioner to

support the compensation order complained of in the bill: *Grant v. Marshall*, deputy commissioner, 56 F. (2d) 654 (Wash. 1931); *United Employees Casualty Co. v. Summerous*, 151 S. W. (2d) 247 (Tex. 1941); *Nelson v. Marshall*, deputy commissioner, 56 F. (2d) 654 (Wash. 1931); *Gulf Oil Corporation v. McManigal*, deputy commissioner, 49 F. Supp. 75 (W. Va. 1943).

The findings of fact of the deputy commissioner supported by evidence should be regarded as final and conclusive and not subject to judicial review: *South Chicago Coal & Dock Co., et al. v. Bassett*, deputy commissioner, 309 U. S. 251 (1940); *Del Vecchio v. Bowers*, 296 U. S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America*, 288 U. S. 162 (1933); *Crowell deputy commissioner v. Benson*, 285 U. S. 22 (1932); *Jules C. L'Hote, et al. v. Crowell, deputy commissioner*, 286 U. S. 528 (1932), 71 C. J. 1927, sec. 1268; *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U. S. 244 (1941); *Marshall, deputy commissioner v. Pletz*, 317 U. S. 383 (1943). [185]

Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable: *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U. S. 244 (1941); *Liberty Mutual Ins. Co. v. Gray*, deputy commissioner, 137 F. (2d) 926 (C.C.A. 9, 1943); *Michigan Transit Corporation v. Brown*, deputy commissioner, 56 F. (2d) 200 (Mich. 1929); *Del Vecchio v. Bowers*, 296 U. S. 280 (1935); *Eastern*

Steamship Lines, Inc. v. Monahan, deputy commissioner, et al., 21 F. Supp. 535 (Me. 1937); Grain Handling Co., Inc. v. McManigal, deputy commissioner, 23 F. Supp. 748 (N. Y. 1938); Simmons v. Marshall, deputy commissioner, 94 F. (2d) 850 (C.C.A. 9, 1938); Lowe, deputy commissioner v. Central R. Co. of New Jersey, 113 F. (2d) 413 (C.C.A. 3, 1940); Contractors, PNAB v. Pillsbury, deputy commissioner, 150 F. (2d) 310 (C.C.A. 9, 1945).

The findings of fact of the deputy commissioner are presumed to be correct: Anderson v. Hoage, deputy commissioner, 63 App. D. C. 169, 70 F. (2d) 773 (1934); Luckenbach Steamship Co. Inc. v. Norton, deputy commissioner, 96 F. (2d) 764 (C.C.A. 3, 1938); Burley Welding Works, Inc. v. Lawson, deputy commissioner, 141 F. (2d) 964 (C.C.A. 5, 1944).

It is solely within the province of the deputy commissioner or compensation administrator to determine the credibility of witnesses, and such official may believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability: Wilson & Co., Inc. v. Locke, deputy commissioner, 50 F. (2d) 81 (C.C.A. 2, 1931); Rakowski's Case, 173 N. E. 521, 273 Mass. 363 (1930); Benjamin v. Rosenberg Bros., et al., 167 N. Y. S. 650 (1917) aff'd. 223 N. Y. 569.

The right, remedies and procedure under the Longshoremen's Act are governed exclusively by the statute, and the powers properly to [186] be exercised by the court are those only which are expressly conferred by the said Act: Associated Indemnity

Corp. v. Marshall, deputy commissioner, 71 F. (2d) 235 (C.C.A. 9, 1934); Shugard v. Hoage, deputy commissioner, 67 App. D. C. 52, 89 F. (2d) 796 (1937); Luyk v. Hertel, 242 Mich. 445, 219 N. W. 721 (1928); Texas Indemnity Ins. Co. v. Pemberton, 9 S. W. (2d) 65 (Tex. 1928); Nierman v. Industrial Comm., 329 Ill. 623, 161 N. E. 115 (1928); Town of Albion v. Industrial Commission, 202 Wis. 15, 231 N. W. 249 (1930). Compare also: Bassett, deputy commissioner v. Massman Construction Company, 120 F. (2d) 230 (C.C.A. 8, 1941) cert. denied 62 S. Ct. 92.

In considering the evidence the deputy commissioner may give weight to "the common-sense of the situation": Avignone Freres, Inc., et al. v. Cardillo, deputy commissioner, et al., 73 App. D. C. 149, 117 F. (2d) 385 (1940).

Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed: Contractors, PNAB v. Pillsbury, deputy commissioner, 150 F. (2d) 310 (C.C.A. 9, 1945); South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner, 309 U. S. 251 (1940); Parker, deputy commissioner v. Motor Boat Sales, Inc., 314 U. S. 244 (1941); Liberty Mutual Insurance Co. v. Gray, deputy commissioner, 137 F. (2d) 926 (C.C.A. 9, 1943); Lowe, deputy commissioner, et al. v. Central R. Co. of New Jersey, 113 F. (2d) 413 (C.C.A. 3, 1940); Henderson, deputy commissioner v. Pate Stevedoring Co., Inc., 134 F. (2d) 440 (C.C.A. 5, 1943); Del Vecchio v. Bowers, 296 U. S. 280 (1935).

The following is a reference to so much of the testimony taken at the hearings before the deputy commissioner as is considered sufficient to show that the above-mentioned finding of fact of the deputy commissioner is supported by evidence. This reference is not intended to cover all of the testimony, as under the authorities it is [187] necessary only to show that there is evidence to support the finding of fact of the deputy commissioner.

Cora E. Olcott testified at the hearing on March 7, 1945, that she was married to the deceased, Walter Olcott, on August 26, 1926, at Tijuana, Mexico (T. 7, 61), and continued to live with him until his last illness (T. 7); that they had no children and were never divorced; that she is 65 years of age; that she does not have a marriage certificate (T. 8); that they were married by a preacher; that she had the papers but has since misplaced them (T. 10) (T. 9, hearing of May 23, 1945); that they were not married in a church; that the deceased made all the arrangements; that some Spanish individual and his wife acted as witnesses to the ceremony (T. 61); that these witnesses were acquaintances of the deceased (T. 62); that the deceased had been well acquainted in Tijuana for some time (T. 5, hearing of May 23, 1945); that after the ceremony she received a certificate written in both English and Spanish, that is, the names were in English; that she has since misplaced the certificate; that she went to Tijuana, Mexico, in search of the record, but has been unable to locate it (T. 62); that she inquired at the Government office at Tijuana and was told by the officials

that they could not find the record; that such officials did not tell her whether they ever had such record, but did say that they could not find the record then; that since 1926 she lived with the deceased as his wife, publicly and honorably (T. 63).

At the hearing on May 23, 1945, before the deputy commissioner Mrs. Olcott testified that many other persons could not find such records at Tijuana (T. 6); that she could not find the place at which they had been married, but that at the time she was married there were a number of places where persons might be married (T. 7); that the ceremony took place in a little bureau of some kind where [188] people go to get married and there were others getting married at the same time (T. 8).

It was stipulated at the hearing on May 23, 1945, that other witnesses if called would testify that the claimant and deceased lived together and conducted and deported themselves as husband and wife for many years (T. 33, 34).

John Roberts testified at the hearing on March 7, 1945, that he had known Mr. and Mrs. Olcott for 19 or 20 years, having been very intimate friends, and having worked with Mr. Olcott for many years; that prior to the time that they were married, Mr. Olcott came to him and told him that he (Olcott) was going to get married; that Mr. Olcott laid off a week and was married; that he then returned with his wife and resumed residence in San Diego; that shortly afterwards Mr. Olcott came by the witness' house with Mrs. Olcott and took both the witness and his wife to see the house they intended to rent; that

Olcott showed him the marriage license, and he noted that it was a marriage license in the Spanish language; that this took place about 18 years ago, and since that time Mr. and Mrs. Olcott have lived together as husband and wife, and have introduced themselves as such (T. 66).

On December 14, 1945, the deputy commissioner inquired of the American Consul at Mexico City whether it was possible in 1926 to be married in Mexico by proxy; on January 17, 1946, the American Consul replied in part as follows:

“ ‘Article 3. On the day and hour designated for the performance of the marriage, there must be present before the Civil Judge, at the place the latter may have determined upon, the parties thereto, in person or through a special representative legitimately appointed, and in addition two witnesses for each one of the parties themselves, to vouch for their identity, as well as the parents or guardians of the parties, if any, and if they should desire to attend the ceremony . . .’ (Emphasis supplied.)

“It is impracticable at this time for the Embassy to determine which of the Mexican States, in [189] addition to the Federal District and Territory of Lower California, were in 1926 subject to the provisions of the Civil Code above cited and which States had Civil Codes of their own. * * *”

(Tijuana, it should be noted, is located in the Territory of Lower California.)

It is believed that the deputy commissioner's award to Cora E. Olcott as the widow of the deceased employee, in the compensation order complained of, is supported by evidence and thus supported, should, under the authorities cited above, be regarded as final and conclusive.

It appears well settled that a marriage may be established by oral testimony. *Ex parte Morgan*, 106 Cal. App. 602, 289 P. 647 (1932), and *In re McGrath's Estate*, 179 A. 599, 319 Pa. 309, 179 A. 599 (1935).

In the California case of *Ex parte Morgan*, *supra*, the Court said:

“It is well-established that a marriage may be established by the testimony of one of the parties thereto. *Budd v. Morgan*, 187 Cal. 741, 203 P. 754; *In re Richards*, 133 Cal. 524, 65 P. 1034; 38 C. J. 1335. The burden of proving a marriage rests on the party who asserts it. 38 C. J. 1321. This obligation was satisfactorily met when the plaintiff in the divorce action proved by her own testimony that she married petitioner.”

In the case of *In re McGrath's Estate*, *supra*, the Court said:

“No case, decided since removal of the disqualification of interest, has been called to our attention which held that the evidence of the surviving spouse is not sufficient without a second witness also testifying to the fact; nor is there any doubt of the competency of a sur-

viving spouse to testify where, as here, the claim is to take by devolution. It is settled in this State that, if other proof is not available, 'the marriage may be established,' as was said In re Craig's Estate, *supra*, 273 Pa. 530 at page 533, 117 A. 221, 22, 'by proof of reputation and co-habitation, declaration and conduct of the parties and such other circumstances as usually accompany the marriage relation. Richard v. Brehm, 73 Pa. 140, 13 Am. Rep. 733.' This is another method complete in itself, of proving marriage." [190]

Budd v. Morgan, 187 Cal. 741, 203 P. 754 (1922), cited in the Morgan case, *supra*, was a suit for the alienation of a husband's affections in which the Court, among other things, said:

"Section 57 of the Civil Code provides as follows:

"Consent to marriage and solemnization thereof may be proved under the same general rules of evidence as facts are proved in other cases. We are of the opinion that the intent of this section of the Civil Code was to enable parties to or persons present at the solemnization of a marriage to testify to the fact within their knowledge that such marriage actually took place; and when to such testimony the additional evidence is educed showing that since said marriage the parties thereto have deported themselves as husband and wife, a *prima facie* case has been sufficiently shown. Subdivision 30

of sec. 1963 of the Code of Civil Procedure, dealing with disputable presumptions, specifies as one of these presumptions ‘that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.’ * * * We are therefore of the opinion that the plaintiff, by the form of evidence which she presented to the trial court, sufficiently made out a *prima facie* case of the existence of the relationship between herself and Orris O. Budd of husband and wife, that the objections of the defendant to such evidence were properly overruled, and that her present contention that the same was insufficient to prove the fact in issue cannot be sustained.”

A marriage *de facto* having been proved it is presumed to be according to law. *Finer, et al. v. Steuer*, 255 Mass. 611, 152 N. E. 220 (1926). In this case the Court said:

“See *Loring v. Thorndike S. Allen*, 257, 260. A marriage *de facto* being proved, it is presumed to be according to law.

“As if a marriage were proved to have taken place in France, for instance, it should seem fit to require the party who denies the marriage to prove its invalidity.’ *Rayham v. Canton*, 3 Pick., 293, 297. * * *”

Further, in the California case of *Ex parte Morgan*, *supra*, which was a case in which the marriage was established by the sole testimony of the wife, the Court said: [191]

"This obligation was satisfactorily met when the plaintiff in the divorce action proved by her own testimony that she married petitioner. It then became incumbent upon the latter to show that his marriage to Mrs. Morgan was invalid.

* * * There is also a presumption and a very strong one, in favor of the legality of a marriage regularly solemnized. * * * Where a marriage in fact was established, as in the instant case (by the testimony of the wife alone), it is presumed to be legal and valid; *In re Pusey*, 173 Cal. 141, 159 P. 433; * * * the duty of proving the contrary rests on the party who attacks it. * * * and it has been held that this is so even though it requires proving a negative. *Hunter v. Hunter*, supra: (111 Cal. 261, 267, 43 P. 756, 757, 31 L.R.A. 411, 52 Am. St. Rep. 180) * * *. (Words in parenthesis supplied.)

A valid marriage also may be presumed to have been entered into upon evidence showing the parties had cohabitated as man and wife and acquired the reputation of being married. *In re Foeld's Estate*, et al., 263 N.Y.S. 327, 147 Misc. 428 (1933). *Smith v. Railway Express Agency*, et al., 174 S. W. (2d) 900 (Mo. 1943). *Thompson v. Thompson*, 236 Mo. App. 1223, 163 S. W. (2d) 792 (1942). In the case of *Foeld's Estate* the Court said concerning this presumption:

"It was said in *Hynes v. McDermott*, 91 N. Y. 451, at page 459, 43 Am. Rep. 677; 'The presumption of marriage, from a cohabitation, ap-

parently matrimonial, is one of the strongest presumptions known to law. This is especially true in the case involving legitimacy. The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence.' In *Morris v. Davies* (5 Cl. & Fin. 163), Lord Lyndhurst speaking of this presumption, says: 'The presumption of law is not likely to be repelled. It is not to be broken in opinion, or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.' In *Piers v. Piers* (2 H. L. Cas. 331), Lord Campbell said, that the presumption could be negatived only 'by disproving every reasonable possibility,' and Lord Brougham, in the same case approved the general doctrine stated by Lord Lyndhurst, in *Morris v. Davies*, and said that the presumption could be repelled only by evidence which was 'clear, distinct and satisfactory.' The presumption has been acted upon in several cases in our courts, and in some recent cases in England, which have a very direct bearing in support [192] of the finding of the jury in this case. See, also, *Matter of Grande's Estate*, 80 Misc. 450, 141 N. Y. S. 535; *In re Hoffner's Estate*, 254 N. Y. 238, 172 N. E. 483."

In *Smith v. Railway Express Agency, et al.*, supra, the Court said in part:

“If parties cohabit together as man and wife, treat each other as such, and acknowledge the existence of that relation, and thereby acquire the reputation of being married among the people, the fact of marriage may well be presumed.”

In *Thompson v. Thompson*, supra, it was said:

“Evidence of cohabitation and general repute, and a declaration and conduct of the parties, constitute primarily, strong and convincing proof of the fact of marriage (*In re Imboden's Estate*, 111 Mo. App. 220, 86 S. W. 263, loc. cit. 267); and if such evidence is not rebutted it becomes conclusive and gives rise to a presumption of marriage, which presumption is one of the strongest known to the law and ‘* * * can be repelled only by the most cogent and satisfactory evidence.’ ”

In California, the presumption of marriage has been written into the statute. Subparagraph 30 of section 1963, chapter 5 of the Code of Civil Procedure, provides that “a man and woman deporting themselves as husband and wife are presumed to have entered into a lawful contract of marriage.” See also the case of *De Hart v. Allen*, 43 Cal. App. (2d) 479, 111 P. (2d) 34 (1941), where the Court said:

“A judgment cannot rest on suspicion alone, and there are certain presumptions applicable here which the statute declares would be satisfactory evidence, if uncontradicted. When these presumptions furnish satisfactory evidence of the fact to be proved and are uncontradicted, they cannot be rejected arbitrarily because of suspicious circumstances in the testimony offered to support them. * * * A man and woman deporting themselves as husband and wife are presumed to have entered into a lawful contract of marriage. Subdivision 30, section 1963. ‘Code Civil Procedure.’”

This next case, *In re Chandler’s Estate*, 113 Cal. App. 630, 299 P. 110 (1931), rehearing of 112 Cal. App. 601, 297 P. 636 denied, was a case in which the facts were strikingly similar to those in the present case. (Reference to pages of the transcript are to the hearing on March 7, 1945, unless otherwise indicated.) The parties were [193] married in Tijuana, Mexico (as in the present case (T. 7)). The widow testified that a marriage certificate had been issued to them at the time (as in the present case), and (as in the present case) was not produced (T. 62). The marriage certificate had been shown to a third party; to the widow’s mother in the Chandler case (and in the present case to one John Roberts, a close friend of the deceased with whom he worked (T. 66)). In both cases no official record of the marriage could be found (T. 62). The widow in the

Chandler case testified there was one person at the marriage ceremony among those present who was an acquaintance of her deceased husband (and in the present case the widow testified that the two witnesses to the ceremony were acquaintances of her deceased husband, they being a man and wife (T. 62)). In both cases it is undisputed that the parties continued to cohabit and live together and deport themselves as man and wife for many years (T. 34, May 23, 1945). Following the marriage in the Chandler case the couple went to the home of the widow's mother where the deceased was introduced by his wife to her mother as her husband (and in the present case, following the marriage the couple returned from Mexico and the deceased introduced Mrs. Olcott to Mr. and Mrs. John Roberts as his wife (T. 65)).

In that case, the Court, among other things, said:

"The respondent testified that she was married to Guy B. Chandler on November 22, 1909, in Tia Juana, Mexico. She testified in considerable detail as to exactly what occurred on the occasion in Tia Juana describing the parties present, including one man who knew Mr. Chandler; that an interpreter told them to write their names, which she and her husband did; that certain things were repeated that she did not remember; and that the interpreter repeated, in closing, that 'you are now pronounced man and wife under the law.' She further testified that

at the time a marriage certificate was given to Mr. Chandler; that the following day they returned to her mother's home in Los Angeles where she introduced Mr. Chandler as her husband; that he then showed her mother the marriage certificate which she read; that her mother read Spanish, having formerly lived in South America; that they remained at her mother's home that night and that the following day they returned to San Bernardino and she went to work in her [194] husband's store. It seems to be settled in this State that a party to a marriage may testify as to its solemnization. Section 57, Civ. Code; In re Estate of Richards, 133 Cal. 424, 65 P. 1034; Budd v. Morgan, 187 Cal. 741, 203 P. 754; Landrath v. Ind. Acc. Comm., 77 Cal. App. 509, 247 P. 227. Under the circumstances it is shown there is a strong presumption that this is a legal marriage. Subdivision 30, sec. 1963, Code Civ. Proc. In Wilcox v. Wilcox, 171 Cal. 770, 155 P. 95, 97, the Court quotes with approval from Bishop on Marriages and Divorces:

“Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proof, the law raises a strong presumption of its legality not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to

make plain, against the constant pressure of presumption, the truth of law and fact that it is illegal and void. Not only is this evidence, in itself, but it has been held that a presumption may under certain circumstances even outweigh positive evidence to the contrary. *Smelle v. Southern Pacific Co.* (Cal. Sup.), 278 P. 343.'

"* * * In addition to this positive testimony and to the presumptions referred to, the record discloses some evidence which tends to corroborate the respondent's testimony. * * * The evidence is absolutely uncontradicted that from 1909 until Mr. Chandler died, nearly twenty years later, these parties continued to cohabit and live together and deport themselves as man and wife, and through all of that time they were generally reputed and known, in the community where they lived as husband and wife.

"We think that under the circumstances here shown, all of these facts could be treated by the trial court as corroborative of, and that they support, the direct testimony of the respondent and the presumption mentioned. Lost and misplaced records of vital statistics, and even the failure to properly record such matters, are not unknown even in this country, and more especially many years ago. If lack of such official records could be taken as conclusive proof that certain facts did not exist, many men of considerable prominence could be proved to have never been born. While the absence of this record was

a fact to be considered by the trial court, it is by no means to be taken as conclusive. * * *

"No other evidence was offered by the appellants in any manner contradictory or attempting to contradict the validity of the marriage in 1909, it being even conceded by them that the parties lived together and were reputed to be husband and wife from [195] that day until the husband's death. To rebut the positive evidence of the fact of marriage in 1909 shown by the record before us, and the presumption above-referred to, it was necessary for the appellants to introduce evidence which carry conviction to the mind of the trial court. Dierks v. Newsom, 49 Cal. App. 789, 194 P. 518, * * * When two people have lived together for nearly twenty years, under the circumstances here disclosed, the validity of their marriage should not be easily set aside."

This case does not involve common-law status nor the validity of common-law marriage in California. The case rests upon a proper legal ceremonial marriage, proof of which is established by testimony, circumstances and cohabitation in the absence of the ability of the widow to locate record proof of the marriage.

In view of the foregoing California and other decisions, it is respectfully submitted that the finding of the deputy commissioner is supported by evi-

dence, that the compensation order is in accordance with law and that the complaint herein should be dismissed.

JAMES M. CARTER,
United States Attorney,

RONALD WALKER,
Assistant United States
Attorney,

/s/ CLYDE C. DOWNING,
Assistant United States
Attorney,

Attorneys for respondent Warren H. Pillsbury,
Deputy Commissioner.

W. E. BOOTE,
Chief Counsel, U. S.
Employees' Compensation
Commission,

HERBERT P. MILLER,
Assistant Chief Counsel,
Of Counsel.

[Endorsed]: Aug. 13, 1946. [196]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Foreword

If there is any requirement that libellants request formal leave to submit additional evidence in order to obtain a trial de novo of the jurisdictional question here involved, such application is hereby tendered. The libellants request leave to take the deposition of the custodian of the official marriage records in Tijuana and Mexicali. These depositions will show that no application to be married was ever made and that there was no marriage in fact in the case at bar. Libellants also request leave to offer in evidence the marriage statutes of Mexico in the original Spanish [197] with translations thereof in English, unless the Court holds—as libellants contend—that the compensation claimant was required to prove the Mexican laws with reference to a valid marriage and that they were complied with by her and the deceased.

Point Number 1

Whether the compensation claimant, known as “Cora Olcott” is the widow of the deceased, is a jurisdictional fact, as to which libellants are entitled to a trial de novo.

Section 903 (33 U.S.C.A.) provides, in part, that “compensation shall be payable under this chapter in respect of disability or death of an employee * * *”,

In *Crowell vs. Benson*, 285 U.S. 22, 56, the Court said :

“In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault on his part, to the liability which the statute creates.” (Emphasis added.)

In this case, the trial court conducted a trial de novo on the issue whether one Knudsen was actually an employee of [198] Benson. The District Court found, after a trial de novo on the law and facts, that the relationship did not exist and enjoined the enforcement of the award. The Circuit Court of Appeals affirmed the District Court. The Supreme Court affirmed the Circuit Court of Appeals, holding this was a jurisdictional question which should be tried de novo.

The same principle applies in the case at bar. Section 909 (33 U.S.C.A.) provides, in part, that “if the injury causes death, the compensation shall

be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

- (a) Reasonable funeral expenses not exceeding \$200.00;
- (b) If there be a surviving wife * * *, to such wife * * * 35 per centum of the average wage of the deceased * * *"

In a death case there are at least three basic and jurisdictional facts:

- (a) the deceased must have been an employee of the person proceeded against;
- (b) the injury causing death must have been sustained on navigable waters; and
- (c) there must be a surviving wife.

The existence of an actual—not colorable or putative—surviving wife is an essential jurisdictional fact. In the absence of such relationship the deputy commissioner has no authority to even consider a claim for a death benefit.

In support of the last statement, please see: Keyway Stevedoring Co. vs. Clark, 43 F. 2d 983. Incidentally, this case brushes aside the contention of respondent that a "common-law" marriage is sufficient to entitle the claimant to an award as a "widow" for the reason that California does not recognize any such [199] marriage.

Point Number 2

The respondent cites a number of irrelevant cases pertaining to general rules. Libellants are aware of

the general rules. However, certain of the contentions of respondent ignore fundamental propositions.

The fact that the claimant and the deceased lived together since 1926 is of no importance in establishing a marriage which would be valid in California. Section 63 of the California Civil Code is the answer to the question whether California would recognize a valid marriage between claimant and Walter Olcott in Mexico, on August 26, 1926. It provides that "all marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted are valid in this state.

Having based her claim on a purported marriage in Mexico, it was claimant's burden to prove the law of Mexico as of August 26, 1926, and the fact that the "marriage" was valid by such law. "Mrs. Olcott" did not offer any evidence as to the Mexican marriage law. Libellants did so, and the evidence is uncontradicted. When the requirements of the law are compared with what the lady testified to it is obvious that there was no marriage "which would be valid by the laws of the country (Mexico)."

The substance of her testimony as to facts is that she and Olcott went to Tijuana on October 26, 1926. She gave her conclusion that she and Olcott were "married." She had no witness to vouch for her identity. She was "married" by a "preacher."

John Roberts' (claimant's witness) testimony is of no probative value, but if full value is given to it, such testimony shows there was no valid marriage

according to the law of Mexico. He said Olcott showed him a marriage license. Olcott told Roberts, "We got married by a preacher." (R. T. proceedings of March 7, 1945, [200] p. 65, L. 26, p. 65, L. 1.)

The letter of January 17, 1946, from the American Consul, quoting from Article 3 of the Mexican marriage statutes, demonstrates that a marriage could not be solemnized by any person excepting a judge. In addition, the law required two witnesses for each one of the parties.

The finding of the deputy commissioner, in the teeth of the Mexican law, is either capricious and arbitrary, or was based upon a misconception of his function and authority. This will be the subject of Point No. 3.

"In those cases in which it is necessary to prove a marriage in fact, as distinguished from a marriage inferred by circumstances, (to wit: a common-law marriage) it must be shown that the person who solemnized the marriage was on having authority to do so, and such authority cannot be proved by his general reputation."

38 C. J. 1310;

Peo. v. Spitzer,

57 Cal. App. 593.

There is no such proof in the record. The allegations in the complaint as to the testimony of Jesus Ruiz, qualified expert on the Mexican law, are admitted in the answer.

In the case of MacArthur v. I. A. C., 220 Cal. 142, the claimant relied on a purported common-law

marriage in Canada. The California Supreme Court held that as the purported marriage was not contracted in accordance with the law of Canada, it was invalid.

In *Temescal v. I. A. C.*, 180 Cal. 637, an ignorant Mexican couple had obtained a marriage license and, thinking that was all [201] that was required, believed they were married. Because of some unusual language in the California Workmen's Compensation Act which authorized an award to any dependent of any deceased employee who was in good faith a member of the household, the Supreme Court of California affirmed the award but held that the woman was not a "wife."

Presumptions (so heavily relied upon by respondent) have no probative value in a Federal Court. (*Liberty Mutual Insurance Co. v. Gray*, 137 F. 2d 926; *Salmon Bay, etc., v. Marshall*, 93 F. 2d 1; and *New York, etc., v. Gamer*, 303 U. S. 161.) The evidence required to support an award must be substantial. (*Bernatowitz v. Nacirema*, 142 F. 2d 385; and *Fireman's Fund v. Peterson*, 120 F. 2d 547.)

Point Number 3

The proceedings before the deputy commissioner were in contravention of the due process clause of the 5th Amendment, U. S. Constitution.

An award must be enjoined if there are any substantial errors in law.

The deputy commissioner refused to receive evidence for the purpose of proving that the purported

marriage was invalid. (Please see: R. T., May 23, 1945, p. 12, L. 2, to p. 14, L. 13; p. 19, L. 26, to p. 20, L. 9.)

In the face of such clear error the award must be enjoined. (Speakes v. Hoage, 78 F. 2d 208; Groom v. Cardillo, 119 F. 2d, 697; and Norton v. Warner, 88 L. Ed. 931.)

Conclusion

It is respectfully contended that the motion for summary [202] judgment should be denied.

Respectfully submitted,

/s/ LASHER B. GALLAGHER,
Proctor for Libellants. [203]

Received copy of the within Memo Pltfs. and Auths. this 10th day of October, 1946.

/s/ JAMES M. CARTER,

U. S. Attorney, Attorney.

By /s/ W. ALLEN.

[Endorsed]: Filed Oct. 10, 1946. [204]

At a stated term, to wit: The July Term, A.D. 1946, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of San Diego on Monday, the 14th day of October, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Paul J. McCormick,
District Judge.

[Title of Cause.]

This cause coming on for hearing on motion of respondent, filed August 13, 1946, for summary judgment; Lasher B. Gallagher, Esq., appearing as proctor for the libelants; Clyde C. Downing, Assistant U. S. Attorney, appearing as proctor for the respondent.

Motion of respondent for summary judgment is denied without prejudice.

It is ordered that the case be transferred to "M" Calendar to be heard in the Central Division and that date, heretofore set, of Nov. 12, 1946, is vacated.

In the District Court of the United States in and
for the Southern District of California, South-
ern Division

In Admiralty—No. 706

FREEMAN STEAMSHIP COMPANY and
FIREMEN'S FUND INSURANCE COM-
PANY, Libelants.

Libelants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, U. S. Employees' Compensation Commission, Respondents.

Respondents.

**JUDGMENT OF DISMISSAL OF SUMMARY
JUDGMENT**

The Motion for Summary Judgment of defendant, Warren H. Pillsbury, in the above-entitled mat-

ter, came on for hearing on the 14th day of October, 1946, at the hour of 2:00 p.m. at San Diego in the courtroom of the above-entitled Court, James M. Carter, United States Attorney, and Clyde C. Downing, Assistant United States Attorney, appearing as attorneys for defendant, Warren H. Pillsbury, and Lasher B. Gallagher appearing as attorney for the plaintiff, and oral argument having been presented by both counsel for the defendant and the plaintiff and after examining all of the authorities submitted on behalf of both said defendant and said plaintiff and after due deliberation:

It Is Ordered, Adjudged, and Decreed that the motion of defendant, Warren H. Pillsbury, for summary judgment be and the same is hereby denied without prejudice to any further proceeding in this matter.

Dated: Oct. 25, 1946.

/s/ PAUL J. McCORMICK,
Judge, United States District
Court.

[Endorsed]: Filed Oct. 25, 1946. [206]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR A
TRIAL DE NOVO ON A JURISDICTIONAL AND BASIC FACT AND MOTION
TO SET CASE FOR TRIAL

To the Respondent Above Named, and to James M. Carter, United States Attorney, Ronald Walker, Assistant United States Attorney, and Clyde C. Downing, Assistant United States Attorney, Proctors for Respondent:

You and Each of You Are Hereby Notified that on Monday, July 14th, 1947, at the hour of 10 o'clock a.m. of said day, or as soon thereafter as said matters can be heard, in the Division of the Honorable Paul J. McCormick, in the Federal Building, Los Angeles, California, the libelants herein, will present the following: [207]

Motion for a Trial De Novo on a Jurisdictional
and Basic Fact

Come now the libelants, Freeman Steamship Company, a corporation, and Fireman's Fund Insurance Company, a corporation, and move the Court for a trial de novo on the jurisdictional and basic fact whether claimant, known as Cora E. Olcott, was actually married to Walter Olcott and was and is the surviving wife of said Walter Olcott, upon the ground that the relationship, if any, of the claimant to the deceased Walter Olcott was and is a jurisdictional and basic fact.

Said motion is based upon this Notice of Motion and Motion for a Trial De Novo on the Jurisdictional and Basic Fact, and upon all records and files in the above action.

Motion to Set Case for Trial

Come now the libelants, Freeman Steamship Company, a corporation, and Fireman's Fund Insurance Company, a corporation, and move the Court for an order setting the above action for trial, upon the ground that it is at issue and ready to be set for trial.

Said motion is based upon this Notice of Motion and Motion to Set Case for Trial and upon all records and files in the above action.

Dated: June 26th, 1947.

/s/ LASHER B. GALLAGHER,
Proctor for Libelants. [208]

Memorandum of Points and Authorities

The claimant is not entitled to any death benefit unless she be the surviving wife of Walter Olcott.

33 USCA, Sec. 909

Whether the claimant is the surviving wife of Walter Olcott depends entirely upon whether she was lawfully married to Walter Olcott. This question is jurisdictional and basic.

It is settled that a trial de novo is required upon application therefor on any jurisdictional fact.

Crowell v. Benson, 285 U. S. 22, 56.

Respectfully submitted,

/s/ LASHER B. GALLAGHER,
Proctor for Libelants. [209]

Received copy of the within Notion of Motion and Motion, Etc., this day of June, 1947.

JAMES M. CARTER,
U. S. Attorney.

RONALD WALKER and
CLYDE C. DOWNING.

By /s/ JAMES M. CARTER,
U. S. Attorney.

By /s/ VELOXES BONHAM,
Proctors for Respondent.

[Endorsed]: Filed June 27, 1947. [210]

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO
MOTION FOR TRIAL DE NOVO

This is a motion for a trial de novo in a proceeding for judicial review of a compensation order filed by the deputy commissioner pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, Chapter 509; U.S.C. Title 33, Chapter 18, Section 901, et seq.

The deputy commissioner in the compensation order complained of made an award to Cora E. Olcott upon a finding that she was the widow of the deceased employee. Libelants brought a proceeding for judicial review of said order under section 21 (b) of the Longshoremen's Act (33 U.S.C.A.,

section 921 (b)), and now contend in this motion that it is entitled to a trial de novo of the issue whether or not she is the widow of the deceased employee. [211]

Libelants rely upon *Crowell v. Benson*, 285 U. S. 22. A cursory examination of that case will show that there were only two issues which the court considered fundamental or basic so as to entitle the plaintiff to a trial de novo thereon, namely, whether the injury occurred upon navigable waters of the United States, and whether the employer-employee relationship existed. See pages 37, 54, 55, 62 and 64 of that opinion. On page 37, this court said:

“The Act has two limitations that are fundamental. It deals exclusively with compensation in respect of disability or death resulting ‘from an injury occurring upon the navigable waters of the United States’ if recovery ‘through workmen’s compensation proceedings may not validly be provided by State law,’ and it applies only when the relation of master and servant exists.’” (Emphasis supplied.)

On page 54, the court said:

“* * * These fundamental requirements are that the injury occur upon the navigable waters of the United States and that the relation of master and servant exist. * * *”

As to the issues other than those mentioned above, namely, the locus of the injury and the employer-employee relationship, the court said:

"Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that, as to questions of fact arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class [212] of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent and consequences of the employee's injuries and the amount of compensation that should be awarded. * * *" (Emphasis supplied.)

On subsequent occasions the Supreme Court reiterated that as to questions other than the locus of injury and the employer-employee status, the finding of the deputy commissioner, where supported by evidence, is not subject to judicial review. *South Chicago Coal and Dock Co. v. Bassett*, deputy commissioner, 309 U. S. 251 (involving the issue

whether the injured employee was a crew member—the Act excludes crew members from coverage); *Del Vecchio v. Bowers*, 296 U. S. 280 (involving whether the injury was self-inflicted—the Act excludes self-inflicted injuries from coverage); *Voehl v. Indemnity Insurance Company of North America*, 288 U. S. 162 and *Parker*, deputy commissioner, v. *Motor Boat Sales, Inc.*, 314 U. S. 244 (involving the issue whether the injury arose out of and in the course of employment—only such injuries are within the Act); *L'Hote, et al., v. Crowell*, deputy commissioner, 286 U. S. 528 (involving the issue whether the parents were dependent upon deceased employee—only dependent parents are entitled to compensation under the Act); *Marshall, deputy commissioner, v. Pletz*, 317 U. S. 383 (involving the issue whether the claim was timely filed—an award can only be made where the claim is filed within the time prescribed in the Act). Compare: *Cardillo, deputy commissioner, v. Liberty Mutual Insurance Co.*, 67 S. Ct. 801 (1947), involving a so-called “jurisdictional” question.

Libelants apparently reason that because “the claimant is not entitled to any death benefits unless she be the surviving wife of [213] Walter Olcott,” her status is a “fundamental or basic” issue, of the kind referred to in *Crowell v. Benson*, supra. In addition to not being one of the two issues specifically mentioned by the Supreme Court in that case as the only fundamental or basic issues, it must be apparent that the test of the fundamental or

basic character of the question does not turn upon whether or not its resolution one way or the other determines the entitlement to compensation since that circumstance exists as to all the issues, *supra*, which the Supreme Court held to be beyond judicial review if supported by evidence. It is, of course, axiomatic that a finding is not final if the reviewing court may determine the issue *de novo*.

Libelants confuse constitutional jurisdictional issues with statutory jurisdictional issues. The former relate to the authority of Congress, constitutionally to enact a statute and to make it applicable in certain circumstances, the existence of which circumstances is the basis for the authority to apply said law, and in the absence of which the law would be unconstitutional, if attempted to be applied. Of such were the two issues mentioned in *Crowell v. Benson*, *supra*. Statutory jurisdictional issues, however, relate not to the authority of Congress to enact the law but to the authority of the deputy commissioner to apply the law because of a limitation in the act itself. In such a category is the issue whether the injury arose in the course of employment, whether it was self-inflicted, whether it resulted in disability, whether (in death cases) the compensation claimant is within the status of those entitled to compensation upon the death of an employee from injury. In none of these circumstances could the deputy commissioner award compensation unless the facts exist which bring the case within the statute; yet as stated by the Supreme Court, there is no

right to a trial de novo as to these issues because they are not fundamental or basic, but only statutory jurisdictional issues. As stated in Wm. Spencer & Son Corp. v. Lowe, deputy commissioner, 152 F. (2d) 847 (C. C. A. 2, 1946) cert. den. 66 S. Ct. 1012 "a trial de novo as to statutory jurisdictional issues is not permissible" [214]

The issue whether Cora E. Olcott is the widow of the deceased employee within the meaning of the Longshoremen's Act is a statutory jurisdictional one and libelants are not entitled to a trial de novo thereon, assuming it had been seasonably demanded in the complaint which is not the case. Libelants' motion should be denied.

/s/ JAMES M. CARTER,
United States Attorney.

/s/ CLYDE C. DOWNING,
Assistant United States Attorney, Attorneys for
Respondent Warren H. Pillsbury, Deputy Com-
missioner.

Of Counsel.

W. E. BOOTE,
Chief Counsel,
U. S. Employees' Compensation
Commission.

H. P. MILLER,
Assistant Chief Counsel.

[Endorsed]: Filed July 14, 1947. [215]

At a stated term, to wit: The July Term, A.D. 1947, of the District Court of the United States of America, for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday, the 30th day of July, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Paul J. McCormick,
District Judge.

[Title of Cause.]

For hearing on motion of libelants for trial de novo on a jurisdictional and basic fact and motion to set case for trial; L. B. Gallagher, Esq., for libelants; Clyde C. Downing, Ass't. U. S. Att'y, for respondent;

Attorney Gallagher makes a statement of movant's position herein citing authorities in support. Attorney Downing makes a statement in opposition. The Court thereupon orders said motion denied.

On motion of Attorney Downing, and counsel for plaintiff concurring, case is ordered to stand submitted on briefs to be filed 10 x 15, libelants to open.

[Title of District Court and Cause.]

LIBELANT'S OPENING BRIEF

As part of their Opening Brief, libelants incorporate herein by reference thereto, the Memorandum of Points and Authorities filed in opposition to motion for summary judgment.

Section 1963, subdivision 30, of the Code of Civil Procedure of the State of California has no force. In *Estate of Elliott*, 165 Cal. 339, 343, the Court says:

"It is not claimed by appellant that there was any ceremony of marriage between him and the deceased other than the one of November, 1902. If that ceremony was absolutely ineffectual, the allegation of marriage was not proved by the evidence of cohabitation as man and wife, together with repute to the same effect. There is, to be sure, [217] a presumption 'that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.' (Code Civ. Proc., sec. 1963, subd. 30.) But this presumption can have no force where it appears that the only attempt to enter into a lawful marriage was in fact illegal and void. (26 Cyc. 877.) At the time of the performance of the ceremony, the law of this state had been changed, so that mere consent followed by a mutual assumption of marital rights, duties, or obligations was no longer sufficient to constitute marriage. At that time there was, and ever since has been, required, in addition to consent, a solemnization authorized by the Civil Code. (Civ. Code, sec. 55.) Under the law as it existed prior to the amendment of section 55 (Stats. 1895, p. 121) marriage might be presumed from cohabitation as husband and wife, even though the intercourse had been, in its

inception, illicit. (White v. White, 82 Cal. 427, (7 L. R. A. 799, 23 Pac. 276).) But since solemnization has been made essential to a valid marriage, a presumption of marriage can no longer be indulged in the face of a showing that there was no solemnization * * *”

Libelants desire to stress the proposition that Section 63 of the California Civil Code provides that:

“All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state.”

It was the burden of the Applicant, having claimed that [218] she was married in Mexico, to prove that the claimed marriage would be valid by the laws of Mexico. Applicant offered no evidence whatever on this subject before the Commissioner.

“As is shown elsewhere, in the absence of statute providing otherwise, the courts of a state or country do not take judicial notice of the statutes of another state or country. Hence, except where it is otherwise provided by statute, it has very generally been held that statutes of other states or of foreign countries are regarded as matters of fact, and that when they are relied on as the foundation of a cause of action or defense, they must be pleaded.”

59 Corpus Juris, 1202, sec. 743.

Libelants do not claim that it was necessary for the Applicant to plead the Mexican law, but it was certainly her burden to prove it and to show by substantial evidence that she and Olcott were married pursuant to the requirements of the Mexican law.

The testimony of Jesus Ruiz, page 11, et seq., Transcript of May 23, 1945, conclusively established that if the testimony of the Applicant was literally true there was in fact no marriage in accordance with the laws of the Republic of Mexico.

Respectfully submitted,
/s/ LASHER B. GALLAGHER,
Proctor for Libelants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Aug. 16, 1947. [219]

[Title of District Court and Cause.]

RESPONDENT'S ANSWERING BRIEF

Since libelants and respondent in their respective briefs, which were submitted upon the motion for summary judgment, discussed fully the law and the facts relating to this case, respondent, like the libelants, incorporates herein by reference thereto the memorandum submitted by respondent in support of the motion for summary judgment.

Libelants apparently realize the decisiveness in the instant case of the presumption of subdivision

30 of section 1963 of the Code of Civil Procedure of the State of California that "a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage." They seek to avoid it by contending that it is not applicable, relying upon the old case of *Estate of Elliott*, 165 Cal. 339, wherein it was stated that said presumption can have no force "where it appears that the only attempt to enter into a lawful marriage was in fact illegal and void." [221] In the instant case, however, there was no evidence that the marriage between the deceased and claimant was "in fact illegal and void." On the contrary, the authorities which we have cited in our brief (page 9 et seq.) are to the effect that a marriage de facto is "presumed to be legal and valid" and the "duty of proving the contrary rests on the party who attacks it." (Quotation is from *Ex parte Morgan*, 106 Cal. App. 602, 289, P. 647 (1932).) Claimant, therefore, was not required, in addition to showing the de facto marriage, to prove that said marriage was performed according to the laws of Mexico, as libelants contend. (We, of course, do not admit that there was any evidence that the marriage between the deceased and claimant in Mexico was not in accordance with Mexican law.)

Conclusion

It is difficult to distinguish the facts in the instant case from those in the case of *In re Chandler's Estate*, 113 Cal. App. 630, 299, P. 110 (1931), where the marriage also took place in Mexico and the par-

ties lived together as husband and wife thereafter for 20 years. The court said that in these circumstances the presumption which the law gives will not be easily overcome.

According to the weight of authority, particularly the California decisions, the deputy commissioner correctly found from the evidence that claimant was the surviving wife of the deceased; the compensation order is in accordance with law and the libel should be dismissed. Cardillo, deputy commissioner, v. Liberty Mutual Insurance Co., 330 U. S. 469 (1947).

JAMES M. CARTER,
United States Attorney.

/s/ CLYDE C. DOWNING,

Assistant United States Attorney, Attorneys for
Respondent Pillsbury.

Of Counsel:

WARD E. BOOTE,
Chief Counsel,
U. S. Employees' Compensation
Commission.

HERBERT P. MILLER,
Assistant Chief Counsel.

[Endorsed]: Filed Nov. 10, 1947. [222]

[Title of District Court and Cause.]

RULING ON MOTION FOR A TRIAL DE NOVO, AND MOTION TO SET CASE FOR TRIAL

Upon consideration of libelants' motion for a trial de novo, and a correlated motion by libelants to set case for trial in this court, and upon consideration of the memoranda of respective proctors, each motion of libelants is denied. Exceptions allowed libelants.

It now appearing from the records and files before this court that the compensation order and award of respondent Deputy Commissioner, dated February 18, 1946, is factually and legally supported and is in all respects in accordance with law, the petition of libelants for injunction is denied in toto, and the libel herein is dismissed with costs.

Cardillo v. Liberty Mutual Co.,
330 U. S. 470;
South Chicago Co. v. Bassett,
309 U. S. 251, at pages 257, 258;
Wm. Spencer, etc., v. Lowe, Deputy
Commissioner, etc., 152 F. 2d 847;
Title 33, Section 921, U.S.C.A.;
Estate of Chandler,
113 Cal. App. 630;
In re Morgan,
106 Cal. App. 602.

Dated January 6, 1948.

/s/ PAUL J. McCORMICK,

United States District Judge.

[Endorsed]: Filed Jan. 7, 1948. [223]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Paul J. McCormick, Judge of the United States District Court, Southern District of California, Southern Division:

Libelants respectfully pray that they and each of them may be permitted to take an appeal from the final decree entered in the above Court on January 7, 1948, to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the Assignments of Error which are filed herewith.

Dated: March 17th, 1948.

/s/ LASHER B. GALLAGHER,
Proctor for Libelants.

[Endorsed]: Filed March 18, 1948. [224]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Now comes the Libelants and hereby assign the following errors in the above-entitled proceedings:

I.

The District Court erred in denying libelants' motion for a trial de novo of the question whether "Cora Olcott" is the surviving wife of Walter Olcott.

II.

The District Court erred in denying libelant's motion to set the case for trial before said District Court.

III.

The District Court erred in ruling that "the compensation order dated February 16, 1946, is factually and legally supported and is in all respects in accordance with law." [225]

IV.

The District Court erred in denying "the petition (sic) of libelants for injunction in toto."

V.

The District Court erred in dismissing the libel.

VI.

The District Court erred in refusing to enjoin the enforcement of the compensation order.

VII.

The judgment of the district court and each of its rulings as set forth in the "Ruling on Motion for a trial de novo, and motion to set case for trial"

signed and dated January 6, 1948, are and each thereof is in contravention of the Fifth Amendment to the Constitution of the United States in that such rulings and each thereof deprive libelants of their property without due process of law.

VIII.

The compensation order and the acts and omissions of the deputy commissioner are and each thereof is arbitrary and capricious, not in accordance with law, and deprive the libelants of their property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

IX.

The compensation order is not supported by substantial evidence.

X.

The District Court erred in refusing to rule that the compensation order was not in accordance with law because the deputy commissioner refused to compel the applicant to sustain the burden of proving a legal marriage according to the law of Mexico and upon the several and distinct ground that the deputy commissioner refused to consider "the question of whether a purported [226] marriage may or may not have been valid or may not have been invalid and in compliance with all formalities."

Dated: March 17th, 1948.

/s/ LASHER B. GALLAGHER,
Proctor for Libelants.

[Endorsed]: Filed March 18, 1948. [227]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The petition of libelants for an appeal from the final decree entered in the above-entitled cause on January 7, 1948, is hereby granted and the appeal is allowed.

It Is Further Ordered, that a certified transcript of the record herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Los Angeles, California, this 18th day of March, 1948.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed March 18, 1948. [228]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The libelants hereby appeal and each of them appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this Court entered herein on January 7, 1948, and from each and every part thereof.

Dated: March 17th, 1948.

/s/ **LASHER B. GALLAGHER,**
Proctor for Libelants.

To: Edmund L. Smith, Clerk, United States District Court; James M. Carter, United States Attorney; Clyde C. Downing, Assistant United States Attorney, 600 Federal Bldg., Los Angeles 12, Calif., Proctors for Respondent.

[Endorsed]: Filed and Mailed Copy to Clyde C. Downing, Attorney for Respondent, March 18, 1948.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

Whereas, Libelants, Freeman Steamship Company and Fireman's Fund Insurance Company have or are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain final decree heretofore made and entered in the above-entitled cause on January 7, 1948; and

Whereas, Fireman's Fund Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California and qualified to act as a surety in this Court, is held and firmly bound unto the Respondent herein and unto whom it may concern in the sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which well and truly to be made it does hereby bind itself, its successors and assigns firmly by these presents and agrees that in case of default or contumacy on the part of the said [230] Appellants Freeman Steamship Company or Fireman's Fund Insurance Company, execution may issue against it, its goods, chattels and lands;

Now, Therefore, the condition of this obligation is such that if the above-named Appellants, Freeman Steamship Company and Fireman's Fund Insurance Company, shall prosecute said appeal with effect, and pay all costs which may be awarded against them as such Appellants if the appeal is not

sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

Dated: Los Angeles, California, March 17th, 1948.

FIREMAN'S FUND

INDEMNITY COMPANY,

[Seal] /s/ A. I. STODDARD,

Attorney-in-Fact.

Examined and recommended for approval as provided in Rule 13.

/s/ LASHER B. GALLAGHER,
Proctor for Appellants.

I hereby approve the foregoing bond this 18th day of March, 1948.

/s/ PAUL J. McCORMICK,
United States District Judge.

The premium charged for this bond is \$10.00 per annum. [231]

State of California,
County of Los Angeles—ss.

On this 17th day of March, 1948, before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared A. I. Stoddard, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said County of Los Angeles the day and year in this certificate first above written.

[Seal] /s/ M. E. BEETH,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires March 24, 1949.

[Endorsed]: Filed March 18, 1948.

[Title of District Court and Cause.]

NOTICE OF FILING BOND FOR COSTS
ON APPEAL

To the Respondent above named and to his Proctors, James M. Carter, United States Attorney, and Clyde C. Downing, Assistant United States Attorney:

You and Each of You Will Please Take Notice that the bond for costs on appeal herein was approved by the Honorable Paul J. McCormick, and was filed in the office of the Clerk of the above entitled Court, on March 18th, 1948, and said bond was executed and given by the Fireman's Fund Indemnity Company, a corporation authorized to execute surety bonds pursuant to the laws of the State of California, said bond being in the sum of Two Hundred Fifty Dollars (\$250.00), and is by reference thereto made a part of this Notice.

Dated: March 22, 1948.

/s/ LASHER B. GALLAGHER,
Proctor for Libelants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed March 22, 1948. [232]

[Title of District Court and Cause.]

PRAECLYPE FOR APOSTLES ON APPEAL

To the Clerk of the above entitled Court:

I hereby request that the record on appeal in the above entitled cause include the following:

1. Libel.
2. Answer of Respondent.
3. Motion for Summary Judgment.
4. Libelants' Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment.
5. Notice of Motion and Motion for a Trial de Novo on a jurisdictional and basic fact and Motion to Set Case for Trial.
6. Respondent's Memorandum in Opposition to Motion for trial de novo.
7. Libelants' Opening Brief on submission of case. [234]
8. Respondent's Answering Brief on submission of case.
9. All Minute Orders entered by the above entitled Court in the above entitled action.
10. Ruling on Motion for a Trial de Novo, and Motion to Set Case for Trial, dated January 6, 1948.
11. Final Decree.
12. Petition for Appeal.
13. Assignments of Error.
14. Order Allowing Appeal.
15. Bond for Costs on Appeal.
16. Notice of Appeal and Affidavit of Service on Respondent.

17. Citation and acknowledgement of service of Citation, copies of Petition for Appeal, Order Allowing Appeal and Assignments of Error.
18. Notice of Filing Bond for Costs on Appeal and Affidavit of Service by Mail.
19. All oral proceedings.
20. All exhibits.
21. Entire record of proceedings before Respondent Deputy Commissioner leading up to the making of the compensation order involved herein as returned by said Deputy Commissioner and on file in the office of the Clerk of the above entitled Court.
22. Transcripts of all oral proceedings before said Deputy Commissioner.
23. Transcript of all oral proceedings, arguments and motions presented to the above entitled Court.
24. Praeclipe and Affidavit of Service by Mail.
25. Any and all documents which are a part of the records of the above entitled Court in the above entitled matter and not hereinbefore specifically requested. [235]

Dated March 22nd, 1948.

/s/ LASHER B. GALLAGHER,
Proctor for Libelants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed March 22, 1948. [236]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 237, inclusive, contain the original Citation and full, true and correct copies of Libel for Injunction Pursuant to Title 33 U.S.C.A., Sec. 921; Answer of Respondent Deputy Commissioner Warren H. Pillsbury; Certified Copy of Record of Proceedings Before Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission; Motion for Summary Judgment; Memorandum in Support of Motion for Summary Judgment; Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment; Minute Order Entered October 14, 1946; Judgment of Dismissal of Summary Judgment; Notice of Motion and Motion for a Trial de Novo on a Jurisdictional and Basic Fact and Motion to Set Case for Trial; Memorandum in Opposition to Motion for Trial de Novo; Minute Order Entered July 30, 1947; Libelant's Opening Brief; Respondent's Answering Brief; Ruling on Motion for a Trial de Novo, and Motion to Set Case for Trial; Petition for Appeal; Assignments of Error; Order Allowing Appeal; Notice of Appeal; Bond for Costs on Appeal; Notice of Filing Bond for Costs on Appeal and Praeclipe for Apostles on Appeal which, together with copy of reporter's transcript

of proceedings on July 30, 1947, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing Apostles on Appeal amount to \$57.90 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 19th day of April, A.D. 1948.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy Clerk.

In the District Court of the United States in and
for the Southern District of California, South-
ern Division

No. 706-SD Civil

FREEMAN STEAMSHIP COMPANY, a corpora-
tion, and FIREMAN'S FUND INSURANCE
COMPANY, a corporation,

Libelants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner, 13th Compensation District,

Respondent.

Honorable Paul J. McCormick, Judge Presiding

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

Wednesday, July 30, 1947

Appearances:

For the Libelants: Lasher B. Gallagher, Esquire.

For the Respondent: James M. Carter, United
States Attorney; by Clyde C. Downing, Assistant
United States Attorney. [1*]

(Case called by the clerk.)

Mr. Gallagher: I know that your Honor has
read the memorandum which was filed in support of
the motion, and also the memorandum in opposition
to the motion for a trial de novo. I want to make a

* Page numbering appearing at top of page of Reporter's certified
Transcript of Record.

brief comment upon the reply memorandum and then state my point concisely and sit down.

In the case of *Crowell v. Benson*, 285 U. S. 22, as read by Government counsel, the Supreme Court is supposed to have said that there are only two jurisdictional questions which could exist in any case under the Longshoremen's and Harbor Workers' Compensation Act. I call your Honor's attention to the proposition that there is nothing in the case which says that.

The principal point involved here, I think, is the fact that the relationship of the delinquent employer in all of these cases is a jurisdictional question; and in that respect I want to call your Honor's attention to the section of the law which has to do with compensation for death. That is Title 33, Section 909.

"If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:"

I will skip (a) because that has nothing to do with it. [2]

"(b) If there be a surviving wife or dependent husband and no child of the deceased, to such wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowhood, with two years' compensation in one sum upon remarriage; * * *"

It is my contention that before the Compensation Commissioner can proceed to determine any ques-

tion of fact with reference to whether there shall be a death benefit, those facts consisting of dependency and the amounts actually contributed by the deceased—there must be two basic facts determined and proved:

No. 1. The death must have occurred as the result of an injury sustained on navigable waters of the United States, or the death must have been sustained upon navigable waters of the United States.

No. 2. The person who is making the application must be the widow or the widower. And those two facts are jurisdictional and basic facts.

If they are jurisdictional and basic facts, then there must be a trial de novo whenever a proceeding by way of injunction is instituted in the United States District Court, for the purpose of reviewing the award of the Commissioner. And that, if your Honor please, is the point.

We relied on the Crowell case because that case said [3] that, as to basic facts, we are entitled to a trial de novo. That is a simple question and it is an important question. I submit it so far as the libelant is concerned.

The Court: Before we hear from you, Mr. Downing, I want to call counsel's attention to the most recent pronouncement of the Circuit Court of Appeals for the Ninth Circuit in the case of Portland Stevedoring Co., appellant, v. Wegener, Deputy Commissioner, etc.

Mr. Gallagher: Wedemeyer, your Honor?

The Court: Wegener. Wegener was the employee and Whipple was the Deputy Commissioner of the 14th Compensation District, decided July 24, 1947.

This was a proceeding where a longshoreman had been injured in service and had obtained the benefits of the remedial legislation in such cases. After payments had been made for a considerable period it was claimed that he had recovered and that, therefore, he was not entitled to further disability awards; and the matter was presented to the Commissioner on that issue. The Commissioner ruled favorably to the disallowance of any further award. An application was made to the court to set aside that decision. Those are briefly the facts of the case.

“Wegener instituted an action to set aside this compensation order”—

I am reading—— [4]

“of July 2, 1945, and the lower court ordered it set aside apparently upon the ground that there was no evidence to support the finding of the Deputy Commissioner to the effect that the disability resulting from the back injury had terminated. The employer appeals from that decree.

“There can be no doubt that in a case disclosing the facts here involved, the Longshoremen’s and Harbor Workers’ Compensation Act * * * contemplates that as to all questions of fact the findings of the Deputy Commissioner, supported by evidence and within the scope of his (here unquestioned) authority shall be final.

See *Cowell v. Benson*, 285 U. S. 22 * * *; *South Chicago Coal, etc., Co. v. Bassett*, 309 U. S. 251 * * *. This rule as to the finality of findings of fact applies where there is any evidence warranting inferences supporting them. *Simmons v. Marshall*, 9 Cir., 94 F. 2d 850, 851.

"It is clear that the District Judge put a different construction on the evidence than did the Deputy Commissioner, which caused him to reach a different conclusion as to the facts. He apparently was of the opinion that there was no evidence that the disability related to the back injury had terminated. But the record does not support this [5] view of the evidence. There was some evidence to the contrary, and under the numerous authorities, the Deputy Commissioner was free to adopt the view of the facts expressed in his finding on this point.

"The evidence revealed an arthritic spine condition (existing prior to the back injury for which compensation was allowed) and this arthritic condition was present in substantially the same degree a short time before the hearing resulting in the challenged order of the Deputy Commissioner. In his brief, the Deputy Commissioner points out that the District Judge arrived at his conclusion by reasoning that Wegener's back condition subsequent to the injury was due to both arthritis and the injury; that said condition had not cleared up at the time of the amputation of the left leg (due to

other causes); that the back condition (due to arthritis and the injury) prevents Wegener from wearing an artificial limb; that therefore the injury continues to cause disability.

"If it be in harmony with the most valid and accepted principles of compensation law to assume that where one condition (related to the injury) combines with another condition (unrelated to the injury) so as to cause disability, the injured [6] employee is entitled to compensation for the resulting disability, then the injury need not be the sole effective cause of the disability. But, as pointed out in the brief of the Deputy Commissioner, the difficulty here is that the condition related to injury (as distinguished from the arthritis) continued after the amputation of the left leg and existed at the time of the hearing. Even though there may have been a conflict in the evidence on this point, or a conflict between evidence and inference, the finding of fact of the Deputy Commissioner, if supported by evidence, is final and conclusive. The record discloses that there was evidence to support his finding and it is not the province of the courts to weigh this evidence. This rule is now too well established to require citation of an impressive list of authorities.

"The District Judge clearly was moved by the most humane and understandable impulses in arriving at his conclusion, but in the absence of any error in law, he was not authorized to try the cause de novo and to weigh the evidence.

This now established construction of the law preserves the clear intent of Congress that the law should be viewed liberally [7] for the protection of workers, and experience appears to have fully satisfied Congress that the existing method of establishing facts provides the fairest approximation of justice.

"The decree of the lower court is reversed."

That is the latest expression of our Court on this construction of *Crowell v. Benson*.

Mr. Gallagher: If your Honor believes that that decision is in point with reference to the proposition involved here, then I see no hope for the libellant in this court. But that decision is no different than a hundred others.

If your Honor wants me to, I can cite to your Honor at least a hundred cases exactly like that, both before and after the *Crowell* case; and the *Crowell* case itself is exactly like that in one respect, where the court says:

"Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that, as to questions of fact arising with respect to injuries to employees within the purview of the Act, the findings of the Deputy Commissioner, supported by evidence and within the scope of his authority, shall be final. * * *"

The Supreme Court said that many years ago. We are not [8] talking here about a case where there

has been a finding about whether this man died or a finding about whether this man had a certain injury. We are discussing here the question whether this woman is the widow of this man or was married to this man, and unless she was a surviving wife the Deputy Commissioner would have no jurisdiction to pass on any question of fact in the case. The Commissioner would have no jurisdiction to determine whether this woman was or was not dependent on this man if she were not the widow.

Whether she was or was not the widow was a basic and jurisdictional fact. This case here that your Honor read does not mention anything about jurisdiction, and it certainly could not overrule the Supreme Court. The Supreme Court holds that, as to jurisdictional and basic questions, we are entitled to a trial de novo. That decision there has nothing to do with jurisdictional questions, because everybody admitted that a man was injured on navigable waters, everybody admitted that he was an employee. The only question was whether the Commissioner had a right to terminate the compensation on the ground that the man's injury had ceased to cause any disability.

The Court: Of course, the court said in the concluding paragraph, which is really the principle that the court announced, after discussing the concrete situation:

“The District Judge clearly was moved by the [9] most humane and understandable impulses in arriving at his conclusion, but in the absence of any error in law, he was not author-

ized to try the cause de novo and to weigh the evidence. This now established construction of the law preserved the clear intent of Congress that the law should be viewed liberally for the protection of workers, and experience appears to have fully satisfied Congress that the existing method of establishing facts provides the fairest approximation of justice."

Now, isn't it true that the status of this woman is a factual question primarily, the fact as to whether there was a marriage?

Mr. Gallagher: In the same sense that whether a man is or is not an employee is a factual question, but it is a jurisdictional factual question.

The Court: Yes; it is a jurisdictional factual question in the sense that there must be evidence that establishes the relationship between the worker and his widow or his claimed widow.

There is evidence here, and it is set up in the petition, which justifies an inference. The woman says that they went to Tia Juana and that they went through some kind of a marriage ceremony there. She does not know where it was; she is not able to identify any persons. She states that certain [10] persons were present at the time of the marriage. There was cohabitation as the result of that.

And now, from those facts and under this authority, isn't it the province of the Commissioner to draw the inference?

Mr. Gallagher: I do not think so. It may be his province, in the first instance, to pass on the jurisdictional fact; but the fact that he has a right to

determine that in the first instance does not remove it from the power of this court to try that issue de novo.

And, so far as the established principles are concerned, I respectfully contend that the Circuit Court of Appeals, that one Circuit Court of Appeals was not even passing on this question. And, as I understand decisions of any court, you must take what they say in the light of the facts which are involved and in the light of questions which are decided, and if they go outside of justiciable questions—questions which are actually presented to the court as disputed questions of law—and make some statement about something else that is unnecessary to the decision, that is just obiter and is of no effect; it is not precedent and it is not authority for anything.

The Circuit Court of Appeals cannot overrule the Supreme Court when the Supreme Court says that you are entitled to a trial de novo on jurisdictional facts. And where they say, [11] aside from errors of law, the decision is final, if they mean to change the rule announced by the Supreme Court in the Crowell case, I do not see how they can do it.

And, so far as the merits of this case are concerned, your Honor, we have not argued those yet, have not briefed them. I do not think there is enough evidence in here, even if there was not the jurisdictional fact, to justify the Commissioner in finding that this woman was the widow of this man. There is no such thing as a common law marriage in California, and he relied on that. In other words, the fact that a man and woman live together in California means nothing.

Now, in view of a code section which was adopted in 1857, I think—anyhow, a long time ago, and which code section has been overlooked in at least 50 or 60 cases by the District Court of Appeals of California, but the Supreme Court of this state has stated very definitely that there is no presumption of marriage from the mere fact that people live together, in California. There is no common law marriage; so the fact that she lived with this man does not prove that she was married to him.

And we can, if we have to, and when the time comes, we will furnish the court with authorities on the proposition that in order to prove a marriage in a foreign place you have got to prove the foreign law and then prove that you complied with it. There are plenty of cases on that. [12]

The Court: Supposing these people had had a child during their cohabitation.

Mr. Gallagher: It would have been illegitimate.

The Court: Well, would the child have been able to reap the benefits of the Act?

Mr. Gallagher: I do not know. Maybe illegitimate children are allowed to reap the benefits of the Act. They are under some compensation acts. That is purely a matter of statute. If it just says "child" and does not say "illegitimate child," then any kind of a child could reap the benefits of the Act.

The Court: It seems to me this is a pretty broad statement, Mr. Gallagher, of the Court of Appeals.

"This now established construction of the law preserved the clear intent of Congress that the law should be viewed liberally for the protection of workers,"

Now, if there be a relationship between a man and a woman, and there is evidence, as there is—I am speaking of your petition. You say we have not reached the point of the merits; that is true. And in your petition you set up what was supposed to be the only evidence that was before the Commissioner, and that is the evidence that I am speaking of. The woman there testified that they went through this marriage ceremony; and, while it is subject to [13] infirmities and reasonable inferences would be justified either way, the Court of Appeals says that the purpose of this law is to assure workers the benefit of this protective instrumentality.

Here is a woman who, clearly, there would not be any room, I think, for any finding but what there was cohabitation. There was admitted consummation. Whether it is sufficient to consummate a marriage or not is not the question; but there was cohabitation between the two of them. They were living together as husband and wife and had been for a considerable period.

Mr. Gallagher: Well, that is not a novel situation in California.

The Court: I am not speaking about that. But this is the point that I am trying to reason: If the purpose of the Statute is to assure workers the benefit of those remedial elements of the law, here is a woman who, as far as the record shows, other than the conclusive proof of the marriage ceremony, was to all intents and purposes this man's wife. There is no evidence that there was infidelity; there is no evidence that she was promiscuous with other

men. There is evidence that they lived together in that relationship and continued to live in that relationship up to the time of his death.

Now, is it the spirit of the law that the court should [14] interpose itself as against the findings of the Commissioner, when the Court of Appeals of this Circuit has said that in the absence of any error in law—not in fact but in law—any error in law, the District Judge was not authorized to try the case *de novo* and to hear the evidence; that the established construction of the law now preserves the clear intent of Congress that the law should be viewed liberally for the protection of workers.

If the court should go into the question as to the validity of the marriage, as to whether or not it was licensed, whether authentic and recorded, as provided in the laws of California, aren't we deviating from the very thing that the Court of Appeals says is the province of the Commissioner?

Mr. Gallagher: Well, I do not think so. And furthermore, I think that the Fifth Amendment to the Constitution of the United States guarantees even an employer the equal protection of the law; and that the law cannot be modified or amended under the term "liberality of construction."

Now, there isn't anything that requires any liberality of construction unless the Statute is ambiguous. If a statute says on its face that the widow, and only the widow, of an employee is entitled to compensation—and that is what the Statute does say—then there is nothing to be construed about it. The woman must be the widow.

The Court: Does it say "widow" or "surviving wife?" [15]

Mr. Gallagher: "Surviving wife." It says the widow is a surviving wife. And in this case we are not dealing with an employer, we are not dealing with an employee, we are dealing with a woman who claims she was married to this man.

I do not see any reason why a court should bend itself over backward to force a corporation to support a woman who was not actually married to an employee. That does not seem to me to be proper.

The Court: Get 33 U.S.C.A.

Mr. Gallagher: I have it here. Your Honor, may I have a telephone message sent over to the Superior Court? I have a jury case waiting there and I was supposed to be there at 11:00 o'clock.

The Court: I am sorry. Mr. Downing, what have you got to say about the matter?

Mr. Gallagher: Does your Honor want to have those definitions?

The Court: I was just going to look them up here.

Mr. Gallagher: I might make it easier by getting the definitions.

"The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; * * *"

That is Section 902 subdivision (16). [16]

Mr. Downing: If the court please, we believe the case that your Honor has just read is very applicable and applies to the case at bar.

We sincerely believe that the libelant is confusing constitutional jurisdictional issues with statutory jurisdictional issues. I have read the case of *Crowell v. Benson* and it occurs to me that the fact the jurisdictional issues having occurred upon navigable waters, the relationship of master and servant very definitely are jurisdictional issues and must be established. But in this case before the Commissioner it certainly was a factual issue as to whether or not this woman is the surviving wife of the decedent; and we believe that, while Mr. Lasher Gallagher says that he has no standing before the court, he still can maintain that the award is not supported by substantial evidence, and the court, of course, can examine the proceedings before the Commissioner and determine whether or not substantial evidence has been introduced.

So I still believe that if there is substantial evidence, that this is a factual issue and the finding of the Commissioner is final and conclusive, and this court is without jurisdiction to disturb it.

I do not believe that this particular issue is an error in law or a jurisdictional issue that would entitle them to a de novo trial. [17]

I have not particularly briefed that particular point where the court is now looking at U.S.C.A., but I do not believe that that, again, is a jurisdictional issue, because we have a good many cases we cited in our memorandum to this effect:

“In such a category is the issue whether the jury arose in the course of employment, whether it is self-inflicted, whether it resulted in dis-

ability, whether (in death cases) the compensation claimant is within the status of those entitled to compensation upon the death of an employee from injury. In none of these circumstances could the Deputy Commissioner award compensation unless the facts exist which bring the case within the Statute; yet as stated by the Supreme Court, there is no right to a trial de novo as to these issues because they are not fundamental or basic, but only statutory jurisdictional issues. As stated in *Wm. Spencer & Son Corp. v. Lowe*, Deputy Commissioner, 152 F. (2d) 847 * * * 'a trial de novo as to statutory jurisdictional issues is not permissible.' ”

We maintain that the issue as to whether Cora E. Olcott is the widow of the deceased employee within the meaning of the Longshoremen's Act is a statutory jurisdictional one and libelants are not entitled to a trial de novo. [18]

The Court: I noticed in the definition of "child" that the relationship of loco parentis is involved there; so that would cover a child born out of wedlock, I suppose, if there was a recognition there that appears.

I am inclined to think that under this decision of the Court of Appeals we have no right to review the finding of the Commissioner. While it is a basic feature in the case, under *Crowell v. Benson* this use of this word "jurisdictional" is, as it is in many instances, a very difficult and complicated question.

Whether it could be called jurisdictional or not, it is a factual question, and the legal conclusion is to be drawn from the facts.

Now, what are the facts set up in the proceeding as it is now projected before the court?

Well, they are substantially as I related: That the woman who claims to be the widow appeared before the Commissioner and testified, and, except as to inferences, there was no dispute on it. She testified that she and Walter Olcott, the seaman, deceased, went to Tia Juana and went before some clergyman and went through some marriage ceremony; that there were some papers executed at that time; that she has lost the papers, could not find them; that there was some person present as a witness but she did not know who he was; he was apparently a stranger to her but that he had witnessed this ceremony; that they had each considered the [19] matter as a marriage by cohabiting.

Then there was testimony of a Mexican lawyer.

Mr. Gallagher: Well, that Mexican lawyer testified to a conflict, your Honor, that if this woman did everything she said she did, she was not married in Mexico; that it was impossible for a clergyman to marry anybody in Mexico at that time. And there is no conflict on that. You would have to have a civil ceremony.

The Court: Did not the Mexican lawyer corroborate her on the fact that she sought to find a record of it.

Mr. Gallagher: She came to him and asked him if he could get her a copy of the certificate; but that,

of course, would not prove that she was married according to the laws of Mexico, if her testimony shows she claimed she was only married by a priest or a preacher.

The Court: She said she was not married by a priest. She said definitely—

Mr. Gallagher: By a preacher.

The Court: That is what she said. It would not establish the fact, of course. I am speaking about inferences under this decision of the Court of Appeals. Wouldn't it have a tendency to buttress the belief that the Commissioner apparently had, that she was telling the truth about the marriage?

Mr. Gallagher: Let us assume that she was telling the [20] truth; that she went to a preacher or somebody she thought was a preacher and went through what she thought was a ceremony of marriage; what of it?

If under a Mexican law the preacher could not have married her, her good faith has nothing to do with it, and the fact that some preacher attempted to marry her would not make her married.

Suppose we had a case involving an alleged marriage in California and some woman claimed that she went before the Mayor of the City of Los Angeles and was married by him. Well, the Mayor of the City of Los Angeles is not a person who can perform a marriage. The mere fact that she went to the City Hall and tried to get a copy of the certificate, thinking that she was entitled to one, or went to a lawyer to get her one, or even brought suit in court to establish the marriage would not be evi-

dence of an actual marriage if the person who is said to have performed it had no authority whatever to do so.

The Court: I do not know as it is necessarily the legal status that the law is designed to effect, because I remember of reading a case where, for instance, a woman had been married to a seaman and subsequently she had gone through a bigamous marriage with another man, left this lawful husband, purported to contract a marriage with a second husband. The seaman died or was injured and died, and she claimed the benefits of the Act. The court held that she was not entitled to it. Now, she was the lawful wife of that man.

Mr. Gallagher: But she was not dependent on him for support at the time of the death, and that is the reason the court would not stand for the award. I remember that case.

The Court: Of course, that is a disjunctive feature in the Act. But if the status of the individuals, as in *Crowell v. Benson*, where the question was the status, or whether the worker was an employee of the employer, if the status is the criterion where there is a claimed widow, that is the sole criterion, then it is applicable in the case that I mentioned, because she certainly was his wife at the time of his death.

Mr. Gallagher: You see, your Honor has overlooked the fact that there are two requisites. You have got to be the wife and you have got to be dependent. If you are not the wife, it does not make any difference whether you are dependent.

The Court: Are they conjunctive or disjunctive?

Mr. Gallagher: I think so.

The Court: Well, let us see if they are.

Mr. Gallagher: No; they are not. There is nothing about dependency of the wife. It is parents or children.

The Court: “‘child shall include a posthumous child, [22] a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a step-child or acknowledged illegitimate child dependent upon the deceased, * * *.”

Mr. Gallagher: Isn’t there something in there about “during dependent widowhood?”

The Court: Well, now, let us see.

“The term ‘widow’ includes only the dependent’s wife living with or dependent for support upon him at the time of his death; * * *,”

Mr. Gallagher: That is “living with or dependent upon.” This other woman would not be “living with him” if she had contracted a bigamous marriage with somebody else.

The Court: No; and she would not be “dependent on him.”

Mr. Gallagher: And she would not be “dependent on him” if she was living with this newly acquired quasi-spouse.

The Court: This woman, according to the record here, was both living with him and was dependent on him for support.

Mr. Gallagher: Yes. We do not claim that she was not living with him and we do not claim that she was not dependent on him or, in any event, we do not claim that he was not supporting her.

The Court: I am going to hold that under this decisions of Portland Stevedoring Co., appellant, v. Wegener, and [23] Whipple, Deputy Commissioner, decided by the Circuit Court of Appeals of the Ninth Circuit on July 24, 1947, the court has no right, under the record as it exists at this time, to try the issues *de novo*.

Mr. Gallagher: Now, this is an admiralty matter and, although there have been many statements made pro and con, I think it is necessary for the libellant to take an exception to the ruling, and we do.

The Court: I think it is.

Mr. Downing: If the court please, I think at this time we would like to ask permission to have 30 days within which to answer or otherwise plead to the petition.

The Court: Any objection, Mr. Gallagher?

Mr. Gallagher: You have already pleaded to it.

The Court: Filed a motion.

Mr. Downing: Filed a motion to dismiss and that was denied.

Mr. Gallagher: I thought you filed an answer.

The Court: I do not believe so.

Mr. Downing: No; I do not think we did. It is my recollection we did not.

The Court: A motion for summary judgment.

Mr. Downing: For summary judgment.

Mr. Gallagher: It was before that, I thought, that they filed an answer. [24]

Mr. Downing: No; I do not think so.

Mr. Gallagher: I have no objection if counsel really needs it, but if counsel for the respondent does not need it, I would appreciate getting this case decided as soon as possible.

The Court: Yes; there is an answer filed.

Mr. Downing: There is an answer?

The Court: There is an answer.

Mr. Gallagher: So that we can get on our way to the Circuit Court of Appeals, because we are paying this woman.

Mr. Downing: Could we have the court take it under submission and give us so many days in which to file briefs?

Mr. Gallagher: Yes. I would suggest that your Honor take the matter under submission now on the merits, and I will get a brief in within 10 days and respondent may have 15, and then the matter may stand submitted.

Mr. Downing: Satisfactory.

The Court: So ordered, Mr. Horn. [25]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 8th day of March, A.D. 1948.

/s/ ALBERT H. BARGION,
Official Reporter.

[Endorsed]: No. 11902. United States Circuit Court of Appeals for the Ninth Circuit. Freeman Steamship Company and Fireman's Fund Insurance Company, Appellants, vs. Warren H. Pillsbury, Deputy Commissioner, U. S. Employees' Compensation Commission, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Southern District of California, Southern Division.

Filed April 20, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11902

FREEMAN STEAMSHIP COMPANY and
FIREMAN'S FUND INSURANCE COM-
PANY,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner, U. S. Employees' Compensation Com-
mission,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL AND DESIGNATION OF PARTS
OF RECORD NECESSARY FOR THE CON-
SIDERATION THEREOF

Appellants adopt as their points on appeal the Assignments of Error appearing in the transcript of the record in this case.

Appellants request that the record as certified to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, be printed in its entirety.

Dated April 27th, 1948.

/s/ LASHER B. GALLAGHER,
Proctor for Appellants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 28, 1948.

